Supreme Court, U.S.
F I L E D

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No.

IN THE

Supreme Court of the United States

CENTRAL NEWSPAPERS, INC.,

Petitioner,

v.

MICHAEL J. JOHNSON and McKINLEY KELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEAL OF THE STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment protects newspapers from liability under state "wiretapping" laws when they accurately report information of public concern that a source -- not a newspaper -- acquires by unlawful interception.

PARTIES TO THE PROCEEDINGS

Respondents Michael Johnson ("Johnson") and McKinley Keller ("Keller") are plaintiffs in two actions against the same defendants. The two actions were consolidated below.

Petitioner Central Newspapers, Inc. ("CNI") publishes *The Alexandria Daily Town Talk* and is a defendant in each of the two consolidated actions below.

Avoyelles Publishing Company ("Avoyelles") publishes the *Avoyelles Journal* and is a defendant in the consolidated actions below.

Carol Aymond, Jr. ("Aymond") is a defendant in the consolidated actions below.

Randy Decuir is the publisher of the *Avoyelles Journal* and is a defendant in the consolidated actions below.

John Doe, aka "Alphonse A. Alphonse," is a writer for the *Avoyelles Journal* and is a defendant in each of the two consolidated actions below.

RULE 29.6 DISCLOSURE STATEMENT

CNI has no parent corporation, and no publicly held corporation owns 10% or more of CNI's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Central Newspapers, Inc. ("CNI") respectfully petitions for a writ of certiorari to review the decision of the Louisiana Court of Appeal entered in this case on December 23, 1998. The Louisiana Supreme Court denied an application for writ on April 1, 1999.

OPINIONS BELOW

The opinion of the Louisiana Court of Appeal is reported at 722 So.2d 1224 (La. Ct. App. 1998). (App. A) The Louisiana Supreme Court's denial of CNI's application for writ seeking review of a judgment is reported at - So.2d -, No. 99-C-0199, 1999 WL 250284 (La. Sup. Ct. April 1, 1999). (App. C)

STATEMENT OF JURISDICTION

The Louisiana Court of Appeal issued its opinion and judgment on December 23, 1998. The Louisiana Supreme Court denied a discretionary application for writ seeking review of a judgment on April 1, 1999. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days after entry of the order denying discretionary review.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Because the proceeding draws into question the constitutionality of the Louisiana Electronic Surveillance Act, a statute affecting the public interest, and neither the State of Louisiana nor any agency, officer or employee thereof is a party, Petitioner notes that 28 U.S.C. § 2403(b) may be applicable.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

La. Rev. Stat. Ann. §§ 15:1303, 15:1307 and 15:1312 (App. G)

STATEMENT OF THE CASE

A. *Factual Background*

On November 6, 1996, CNI, publisher of *The Alexandria Daily Town Talk*, attended a press conference in Bunkie, Louisiana called by Carol Aymond, Jr. ("Aymond"), an attorney who had campaigned unsuccessfully against respondent Johnson for the district judgeship in Avoyelles Parish, Louisiana. (App. H)

At the press conference, Aymond revealed that he had obtained a tape recording of a telephone conversation between respondents Johnson and Keller.[1] Suggesting that the taped conversation contained evidence of corruption and possible vote-buying, Aymond played the recording of the telephone conversation at the November 6 press conference and distributed transcripts to the news media. For purposes of this Petition, CNI does not dispute that Aymond obtained the tape in violation of the Louisiana Electronic Surveillance Act, LSA-R.S. 15:1302, et seq. (App. 2a)

CNI and Avoyelles Publishing Company ("Avoyelles"), publisher of the *Avoyelles Journal*, were present at the news conference with other members of the media. Each published news articles regarding the press conference and portions of the tapes aired by Aymond. (App. 2a)

It is undisputed that neither CNI nor Avoyelles took part in any unlawful interception of the conversation between Johnson and Keller. CNI learned of the tape for the first time at the November 6, 1996 press conference. (App. 2a-3a)

B. Proceedings Below

Johnson and Keller each filed suit in the 12th Judicial District Court, Parish of Avoyelles, against Aymond and the newspaper publishers, seeking damages under the Louisiana Electronic Surveillance Act, LSA-R.S. 15:1302, et seq. (the "Act). The Johnson and Keller suits have been consolidated. The suits do *not* allege that either of the newspapers had any

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[1] Respondent Michael Johnson ("Johnson") was the District Judge but was removed from that position for ethical misconduct by the Louisiana Supreme Court in November 1996. Respondent McKinley Keller ("Keller") is an Avoyelles Parish Police Juror and political ally of Johnson. (App. H)

involvement in preparing the unlawful tape recording. Rather, the suits allege that CNI violated the Act by publishing the contents of the communications revealed at the press conference. (App. 2a-3a)

In response to the suit, on June 10, 1997, CNI filed a Peremptory Exception of No Cause of Action. Though its Answer had preserved the issue of the constitutionality of the Act as applied, the Peremptory Exception did not raise a federal constitutional defense. The trial court granted CNI's Peremptory Exception on August 12, 1997, and CNI was dismissed from the case by Judgment dated August 22, 1997. (App. B) Despite the narrow scope of CNI's Peremptory Exception, the trial court's ruling was based on both state law and federal constitutional grounds. Respondents appealed, and on April 1, 1998, the Third Circuit Court of Appeal reversed the trial court's decision, holding that CNI had not raised a constitutional defense and that the trial court should not have reached the federal question. (App. E) In that appeal, CNI preserved the constitutional issue but raised only its state law defenses. The claim against CNI was then remanded to the trial court for further proceedings.

On August 25, 1997, Avoyelles, CNI's co-defendant, moved for summary judgment seeking dismissal from the suit. Like CNI's peremptory exception, Avoyelles' Motion raised only state law defenses. The trial court likewise granted Avoyelles' motion and rendered judgment dismissing Avoyelles on October 23, 1997. Again, plaintiffs appealed. (App. 3a)

In an opinion dated December 23, 1998, the Louisiana Court of Appeal reversed the trial court's dismissal and remanded the case to the trial court. (App. A) The Court of Appeal's sweeping opinion does not limit itself to the state law issues raised in Avoyelles' motion for summary judgment, but included a final adjudication of the federal constitutional issues, in advance of trial, that are conclusive of the federal

constitutional defenses of both CNI and Avoyelles. The Court of Appeal decided the constitutional issue presented in this Petition based upon the trial court record made in connection with CNI's Peremptory Exception, in which the trial court had considered the federal consitutional claim *sua sponte*. (App. 3a-5a)

In its opinion, the Court of Appeal held that a balancing of First and Fourth Amendment rights resulted in no protection for the newspapers. (App. 6a-9a) Because the Court of Appeal had decided substantive federal constitutional issues on the merits, CNI and Avoyelles raised the First Amendment questions at issue in this Petition before the Louisiana Supreme Court on January 21, 1999. On April 1, 1999, the Louisiana Supreme Court denied CNI's Application by a 4-3 vote. (App. C)

The federal question in this Petition was properly and timely presented to the Louisiana Supreme Court after the Court of Appeal decided it *sua sponte* in its December 23, 1998 opinion in a posture that binds CNI. The Louisiana Supreme Court's denial of CNI's application for writ represents a final decision of the federal question presented in this Petition. Accordingly, this Court has jurisdiction to consider that decision at this stage. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

REASONS FOR GRANTING THE WRIT

This case presents an important question of First Amendment law on which this Court has heretofore reserved decision. *See Florida Star v. B.J.F.*, 491 U.S. 524, 535 n.8 (1989) (reserving question of First Amendment protection for publication of information of public concern unlawfully acquired by a source).

Despite the absence of Supreme Court authority on the narrow question presented in this Petition, the decision of the Court of Appeal is in direct conflict with the principles underlying the holdings of four decisions of this Court, and it also conflicts with the decisions of lower courts in nearly identical cases.

In *Florida Star*, this Court held that the First Amendment prohibits states from penalizing the accurate publication of innocently obtained information on a matter of public concern, unless the punishment is "narrowly tailored" to serve a state interest of the "highest order." 491 U.S. at 541. Yet without citing *Florida Star* or other applicable authority of this Court, the Court of Appeal held that the First Amendment does *not* protect Petitioner CNI from liability under the Louisiana Electronic Surveillance Act, La. R.S. 15:1302-1312 (the "Act"), for publishing an accurate report of information revealed to it at a public press conference by a person who had obtained an unlawfully taped conversation between two public officials.

This case arises from a report on a matter of grave public concern: evidence of alleged corruption by a member of the judiciary. For purposes of this Petition, CNI does not dispute that its source, Carol Aymond, furnished evidence that had been obtained in violation of the Act. But there is *no* contention in this case that the press was involved in any unlawful taping – to the contrary, CNI learned of the taped conversation only when Aymond placed it in the public domain by playing it at a public press conference.

This case brings into sharp relief the compelling public interest in ensuring the integrity of the judiciary and the importance of the role of a free press in reporting such matters. *See, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) ("The operation of the Virginia [Judicial Inquiry and Review] Commission, *no less than the operation of the judicial system itself, is a matter of public interest, necessarily engaging*

the attention of the news media.") (emphasis added). The Louisiana Court of Appeal's conclusion that the press cannot report on publicly revealed evidence of judicial misconduct without incurring liability under the Act amounts to a complete rejection of the First Amendment protections established by this Court in *Florida Star* and the line of cases that preceded it.

It merits note that the Louisiana Act is modeled on the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (the "federal wiretap statute"). Specifically, both the Louisiana Act and the federal wiretap statute generally prohibit the disclosure of an unlawfully intercepted communication. *See* La. Rev. Stat. Ann. § 1303(A)(3); 18 U.S.C. § 2511(c). At least two decisions interpreting the constitutionality of the federal wiretap statute's prohibition on disclosure of unlawfully intercepted communications (as applied in similar circumstances) are under review by the federal circuit courts.[2] Consequently, the national ramifications of this issue – and the importance of a decision by this court to bring certainty to this area of the law – cannot be overstated.

I.

THE COURT OF APPEAL'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT PUBLICATION OF TRUTHFUL INFORMATION REGARDING MATTERS OF ACUTE PUBLIC CONCERN IS PROTECTED UNDER THE FIRST AMENDMENT.

This Court has expressly held that the First Amendment prohibits states from punishing the press for

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[2] *Boehner v. McDermott*, 1998 WL 436897 (D.D.C. July 28, 1998) (D.C. Cir. No. 98-7156) (decision pending); *Bartnicki v. Vopper* (3d Cir. No. 98-7156) (decision pending regarding constitutionality of federal wiretap statute and parallel Pennsylvania act).

accurately publishing lawfully acquired information of public concern. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (holding that First Amendment protected newspaper's publication of rape victim's name, where newspaper had lawfully obtained information not available for public inspection).[3] To that end, this Court has repeatedly held that the First Amendment generally prohibits the states from imposing penalties on newspapers for publication of lawfully-obtained, truthful information relating to even private matters. *See Smith v. Daily Mail Publ. Co.*, 443 U.S. 97 (1979) (holding First Amendment protected newspaper's publication of name of juvenile offender despite state law to the contrary); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (holding First Amendment protected newspaper's publication of confidential inquiry before Judicial Inquiry and Review Commission); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding First Amendment protected broadcaster's right to publish name of rape victim despite state law prohibition). In its decision, the Court of Appeal cited none of these controlling decisions, and its analysis does not reflect the legal rules contained therein. *See* App. A.

In *Florida Star*, the Court specifically declined to decide the narrow question whether the First Amendment bars liability for the accurate publication of information that was unlawfully acquired by a source, and held only that the First Amendment protects the accurate publication of lawfully obtained information. 491 U.S. at 535 n.8; *see also Landmark Communications*, 435 U.S. 829, 837 (1978); *New York Times Co. v. United States*, 403 U.S. 713 (1971). This case squarely presents that precise question in the context of a

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[3] Though the government "source" in *Florida Star* did not *obtain* the information unlawfully, its *release* of information that was not open to inspection by the public facilitated the newspaper's publication in violation of state law. 491 U.S. 531. The government's colorable violation of state law led to a settlement of the plaintiff's claim before trial for $2,500.

report on a matter of intense public importance. This Petition does *not* present the broader question whether publication of any truthful information may ever be punished consistent with the First Amendment.

II.
THE INFORMATION AT ISSUE IN THIS CASE IS A MATTER OF GRAVE PUBLIC CONCERN, AND THE STATE LACKS AN INTEREST OF "THE HIGHEST ORDER" IN PUNISHING ITS PUBLICATION.

In *Florida Star*, this Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . ." 491 U.S. at 541. The protection of public officials from the release of evidence of official misconduct is not a "state interest of the highest order" sufficient to justify punishment of CNI's accurate report. In *Florida Star* and *Cox*, this Court held that even the strong state interest in protecting against disclosure of the identities of rape victims was not sufficient to overcome the First Amendment protections at stake. Similarly, in *Landmark Communications*, this Court held:

> Moreover, neither the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality. Admittedly, the commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have established, however, that injury to official

> reputation is an insufficient reason "for repressing speech that would otherwise be free."

Landmark, 435 U.S. at 841-42 (citations omitted) (emphasis added). Here, the allegations of judicial corruption contained in CNI's report are not the deeply private matters at issue in *Florida Star* and *Cox* – they are fundamentally *public* matters.

The integrity and ethics of government officials, including members the judiciary, are inherently matters of significant public concern. Indeed, the public interest in ensuring judicial integrity often outweighs the privacy interests of individual judges. *See In re Kading*, 235 N.W.2d 409, 417-18 (Wis. 1975) (identifying "paramount public interests" in assuring judicial integrity) (emphasis added). Contrary to the Court of Appeal's reasoning, the privacy interests of public officials do not outweigh the First Amendment protections for the publication of truthful information about them – they are subordinate to the overriding public interest in guarding against official corruption.

As this Court later held in *Butterworth v. Smith*, 494 U.S. 624 (1990), the First Amendment prohibits efforts "to punish the publication of information relating to alleged governmental misconduct – speech which has traditionally been recognized as lying at the core of the First Amendment." *Id.* at 632. The *Butterworth* Court held that even the historic interest in grand jury secrecy was insufficient to warrant a ban on disclosure of testimony by a witness. *Id. A fortiori*, no compelling state interest in punishing publication of the truth about allegations of judicial corruption exists in this case.

If the First Amendment were as insubstantial a shield as the Court of Appeal held, then the press would also be subject to potential liability for reporting on the recent impeachment of President Clinton – an event of public

concern that stemmed largely from the contents of intercepted wire communications, allegedly performed in violation of a state wiretap law. To preserve core First Amendment values, the press cannot constitutionally be punished for accurately publishing information of public concern – however generated – once the source of the information has placed it in the public domain. To place the onus on a newspaper to keep secret that which has become public knowledge turns the First Amendment on its head. It is the duty of the press to report on allegations of official misconduct so the truth will out – and the citizenry be informed.

III.

THE COURT OF APPEAL'S HOLDING CONFLICTS WITH THE DECISIONS OF LOWER FEDERAL COURTS ON NEARLY IDENTICAL FACTS.

In three cases, two United States district courts have recently confronted the question whether the First Amendment protects subsequent publication of unlawfully taped conversations where the information is in the public interest. Each concluded that it does.[4]

In *Peavy v. New Times, Inc.*, 976 F. Supp. 532 (N.D. Tex. 1997), a newspaper published the contents of an illegally taped conversation involving a school board official. There, as here, the newspaper had no role in committing the

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[4] At least one state court has concluded that the media defendant may be liable for publishing purely *private* information. *Natoli v. Sullivan*, 159 Misc.2d 681, 606 N.Y.S.2d 504 (Sup.Ct.1993), *aff'd*, 206 A.D.2d 841, 616 N.Y.S.2d 318 (App.Div.1994). Because the information in this case is of the highest public concern, clarification of the scope of First Amendment protection is warranted.

unlawful interception, but simply acquired a copy of the tape once it had been placed in the public domain. The court unequivocally held that "the federal wiretap act cannot be constitutionally applied to prohibit the newspaper and its editor from publishing the transcript of a telephone conversation which was read at the public school board meeting, *even assuming that they knew the conversation had been illegally recorded* by some unknown person." *Id.* at 534 (emphasis added).

As the *Peavy* court recognized:

> The guiding principle articulated in *Smith v. Daily Mail Publishing Co.*, which is used to address attempts to punish truthful publication, is this: "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." Relevant to this inquiry are three considerations: (1) whether the newspaper "'*lawfully* obtain[ed] *truthful* information about a matter of public significance;'" (2) whether imposing liability on the defendant serves a "need to further a state interest of the highest order;" and (3) whether allowing the media to be punished for publishing the information would result in "timidity and self-censorship."

976 F. Supp. at 538 (emphasis in original). Here, CNI lawfully obtained the tape under the standards articulated in *Florida Star*, there is no cognizable state interest of the highest order in protecting against public disclosure of alleged official corruption, and the Louisiana Court of Appeal's decision will surely have an unconstitutional chilling effect on the publication of information in the public interest.

In reaching its result, the *Peavy* court properly followed the analysis dictated by the unwavering precedent of this Court. Importantly, it recognized that the countervailing interests at issue seldom satisfy the constitutional requirement of being interests "of the highest order":

> In *Daily Mail*, the Supreme Court held that the state interest in protecting the anonymity of a juvenile offender was not substantial to permit the state to punish the publication of the offender's name, lawfully obtained. In *Florida Star*, the court held that a statute under which a newspaper was punished for publishing the identity of a rape victim did not serve a "state interest of the highest order." Finally, in *Landmark Communications, Inc. v. Virginia*, the Supreme Court concluded that the state interests in prohibiting publication of confidential proceedings before a judicial conduct review committee was not sufficiently substantial enough to justify the encroachment on First Amendment guarantees. *Certainly, in light of these precedents, the interest in protecting the statutory privacy rights of Peavy, an elected official, is not compelling enough to warrant infringement on the constitutional rights of the Defendants to publish matters of paramount public import. While the privacy interest at stake here is less than compelling, the public interest in the publication of these transcripts, on the other hand, is great.*

976 F. Supp. at 539 (citations omitted) (emphasis added).

A television station's broadcast of the same illegally taped conversation led to a similar decision in *Peavy v. WFAA-TV*, Inc., 37 F. Supp. 2d 495 (N.D. Tex. 1999) ("*Peavy II*"). In both cases, the courts granted summary judgment for the media defendants based on the principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information,

absent a need to further a state interest of the highest order." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

Noting that "[n]o court has ever addressed whether the government may punish a media defendant for publishing truthful information that has been unlawfully acquired by a source," the *Peavy II* court concluded that the media's innocent acquisition of unlawfully obtained evidence through a legitimate newsgathering technique triggered First Amendment protection. 37 F. Supp.2d at 516. Concluding that the media had obtained the information lawfully because it had used a "routine newsgathering technique," the *Peavy II* court relied on this Court's holding that a "'journalist is free to seek out sources of information . . . and . . . government cannot restrain the publication of news emanating from such sources.'" *Id.* (quoting *Pell v. Procunier*, 417 U.S. 817, 834 (1974)).

The *Peavy II* court articulated the proper synthesis of this Court's earlier decisions: "As long as a media defendant does not personally intercept a protected communication or procure another to do so, any information acquired through legitimate newsgathering techniques is 'lawfully obtained.'" *Id.* There, as here, the media defendants had no role in committing the unlawful interception, but simply reported information they gathered through "routine newsgathering" techniques after it entered the public domain.

Moreover, this Court consistently has held that privacy interests of public officials, in particular, often must bow to the media's First Amendment rights. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (truth is an absolute defense to defamation, and even publication of false information about public officials requires a showing of actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334 (1974).

The *Peavy II* court recognized that the privacy right at issue "is not the constitutional right of privacy – that is "the right to be left alone" from government intrusion into personal and intimate decisions and beliefs. 37 F. Supp. 2d at 517 (citing *Carey v. Population Services Int'l*, 431 U.S. 678, 684-85 (1977). Rather, the privacy rights there, as here, are statutory and, while certainly important, "they fare poorly against the constitutional rights of a free and unfettered press." *Id.*

Shortly after the decision in *Peavy I*, the United States District Court for the District of Columbia faced a nearly identical issue. In *Boehner v. McDermott*, 1998 WL 436897 (D.D.C. July 28, 1998), Rep. John Boehner filed an action against Rep. James McDermott after McDermott released copies of a tape of an unlawfully intercepted telephone conversation between, among others, Boehner, Rep. Newt Gingrich and Rep. Richard Armey. Boehner sought relief under the federal wiretap statute and its Florida counterpart. Following the same analysis employed by the *Peavy* court, the *Boehner* court concluded that the First Amendment protected the disclosure of the tape.

The *Boehner* court specifically followed this Court's authority:

> [T]he relevant case law seems to suggest that information not illegally acquired is lawfully obtained, even though its source may have obtained it illegally. For example, in the *Florida Star* case, the Duval County Sheriff's Department inadvertently published the name of a rape victim on a public blotter sheet, even though a state statute prohibited publication of such information. The police department was unquestionably liable for breaking the law, and it eventually settled a suit against it; however, the Supreme Court held that newspapers publishing the name were not liable. In holding the papers free from liability, the Court

> held that the information taken off the police blotter, to which the press had lawful access, was lawfully obtained by the newspapers. *Florida Star*, 491 U.S. at 534.

1998 WL 436897, at *4. Here, CNI had lawful access to the press conference, and its publication is similarly protected from liability. As in *Boehner*, the privacy interest embodied in the Act is insufficient to outweigh the First Amendment protections:

> Although protection of privacy is certainly a substantial government interest, it is not clear that it is an interest "of the highest order," such that it can trump defendant's First Amendment rights. The rape victims in *Florida Star* and *Cox Broadcasting* each had a substantial interest in privacy and anonymity, yet that interest was insufficient to overcome the First Amendment rights of the entities that printed or broadcast their names. Taking these cases as models for the present one, the Court cannot see how the government interest in protecting privacy of wire, electronic or oral communication is of any higher
>
> order than the protection of privacy for rape victims.

1998 WL 436897, at *7.

Had the Louisiana Court of Appeal followed the analysis that the First Amendment requires, it would have been compelled to reach the same conclusion reached by the *Peavy* and *Boehner* courts: the First amendment protects such reportorial activities, and the suit should be dismissed as a matter of constitutional law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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June 30, 1999

APPENDIX A — DECISION OF THE LOUISIANA COURT OF APPEAL DECIDED DECEMBER 23, 1998

McKinley KELLER, Plaintiff-Appellant,
v.
Carol AYMOND, Jr., et al., Defendants-Appellees.
Michael J. Johnson, Plaintiff–Appellant,
v.
Carol Aymond, Jr., et al., Defendants-Appellees.

Nos. 98-844, 98-843.

Court of Appeal of Louisiana,
Third Circuit.

Dec. 23, 1998.

BEFORE: THIBODEAUX, DECUIR, and GREMILLION, Judges.

THIBODEAUX, Judge.

The plaintiffs in these consolidated cases, Michael J. Johnson and McKinley Keller, sued, among others, the Avoyelles Publishing Company and its publisher, Randy DeCuir, for publishing the contents of their private telephone conversations allegedly intercepted in violation of the Louisiana Electronic Surveillance Act, La.R.S. 15:1301 et seq. The trial court, finding a lack of criminal willfulness on the part of the newspaper, granted summary judgment to the defendants, and the plaintiffs filed this appeal. Following our *de novo* review of the record, we reverse the summary judgment granted below due to issues of fact and law.

I.
ISSUES

We must consider:

1) whether the trial court erred in granting summary judgment to DeCuir and Avoyelles Publishing Company due to issues of fact or law regarding the defendants' violation of the Electronic Surveillance Act, R.S. 15:1301 et sequitur;

2) whether a criminal violation of La.R.S. 15:1303 is a prerequisite to a civil action under R.S. 15:1312; and,

3) whether the Electronic Surveillance Act, La.R.S. 15:1301 et seq, violates the constitutional rights of the defendant newspapers.

II.
FACTS

These consolidated lawsuits arise in part from the alleged illegal interception and taping of various private telephone conversations between the plaintiffs, Michael J. Johnson and McKinley Keller, and others. Mr. Johnson and Mr. Keller sued the defendant, Carol Aymond, Jr., alleging that he illegally intercepted and taped their conversations, that is, without the consent of any party involved, in violation of the Electronic Surveillance Act (hereinafter "the Act") at La.R.S. 15:1301, et sequitur. Mr. Aymond then allegedly called a press conference, played the tapes, and distributed copies of the transcripts of the taped conversations to those in attendance, including various newspapers and their associated reporters. The trial court has previously held that Mr. Aymond's actions constituted a "disclosure" under the Act.

The newspapers then allegedly printed excerpts from the contents of the intercepted communications of Mr. Johnson and Mr. Keller. Accordingly, the plaintiffs sued the newspapers, including the defendants herein, the Avoyelles Publishing Company and the publisher and editor/correspondent of the Avoyelles Journal (hereafter

collectively referred to as "Avoyelles Publishing"), for publishing the contents of illegally intercepted communications, which is specifically prohibited under the Act at La.R.S. 15:1307. The plaintiffs also allege the newspaper's violation of the Act through "disclosure" and "use" of the intercepted information.

The district court previously granted an Exception of No Cause of Action filed by another defendant, Central Newspapers, which we reversed. *Johnson v. Aymond*, 97-1466 (La.App. 3 Cir. 4/1/98); 709 So.2d 1072, writ denied, 98-1181 (La.6/19/98); 720 So.2d 1214. The district court then granted a partial summary judgment in favor of Avoyelles Publishing, which we now reverse. The record does not contain a transcript of the summary judgment hearing or written reasons by the trial court explaining its granting of summary judgment in favor of Avoyelles Publishing. However, the record indicates that the trial judge followed the same reasoning articulated in its prior judgment in favor of Central Newspapers, and those written reasons are included in the record. Accordingly, it is not necessary in this case to read the hearing transcript, and we find sufficient information in the record to aid us in our decision in this case.

III.
LAW AND DISCUSSION
Standard of Review

Appellate courts review summary judgments de novo, under the same criteria that govern the district court's consideration of the appropriateness of summary judgment. *See Schroeder v. Board of Supervisors*, 591 So.2d 342 (La.1991); *Benoit v. Roche*, 94-715 (La.App. 3 Cir. 6/14/95); 657 So.2d 574. A motion for summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the

mover is entitled to judgment as a matter of law. La.Code Civ.P. art. 966.

Assignments of Error

Michael Johnson and McKinley Keller contend that the trial court erred in granting partial summary judgment to the defendants, Randy DeCuir and The Avoyelles Publishing Company, due to the existence of material issues of fact and as a matter of law. The plaintiffs further ask whether the court erred in ruling that there must be criminal willfulness by the defendant in violating R.S. 15:1303 before a civil remedy can be sought under R.S. 15:1312, and whether the court erred in holding that the Act was a violation of the defendant newspaper's First Amendment (free speech/free press) rights.

Constitutionality of La.R.S. 15:1301 et seq. Privacy Versus Access

As to the First Amendment violations, in reversing the Exception of No Cause of Action of Central Newspapers, in *Johnson v. Aymond*, 709 So.2d 1072, we held that the lower court erred in considering the constitutionality of these statutes because the issue was not properly pled and because the Attorney General was not notified of the constitutionality proceeding pursuant to La.R.S. 13:4448.

In declining its jurisdiction to hear the issue, the Louisiana Supreme Court held that the trial court never specifically rendered the Electronic Surveillance Act unconstitutional but stated that "the merits of the case and/or evidence presented at trial will decide the issue of constitutionality of La.R.S. 15:1301, et seq." *See Keller v. Aymond*, 97-2203, 97-2204 (La.11/19/97); 702 So.2d 1387. Notwithstanding, the Louisiana Supreme Court subsequently declined jurisdiction on the constitutionality issue again and transferred the appeal to this court in *Keller v. Aymond*, 98-0552, 98-0553

(La.4/23/98); 717 So.2d 1151. Moreover, there is evidence in this record that an "exception based upon unconstitutionality" was filed by the defendant, Aymond, in a prior related proceeding. While the lower court did not declare the entire statute unconstitutional so as to require the Attorney General's involvement, the trial court has twice held that once the illegally intercepted conversation was disclosed by Aymond, any restrictions upon the newspaper from reporting this disclosure would be a violation of the constitutional right of freedom of the press. Accordingly, we will now decide the constitutional issue which has been raised again by both plaintiffs and defendants in their briefs to this court.

The Electronic Surveillance Act, La.R.S. 15:1301 et sequitur, provides generally that it is unlawful to intercept, disclose, or use wire or oral communications unless authorized to do so under color of law and with the consent of at least one of the parties to the communication. Title 15 contains three sections which are pertinent to this case: section 1303, which provides specific remedies in the form of criminal fines and imprisonment for the "willful" interception, disclosure and use of the communication; section 1307, which does not specify a remedy, but prohibits publication and court use of the information; and section 1312, which provides specific civil remedies in the form of monetary damages, including attorney fees and punitive damages, against any person who intercepts, discloses or uses such information.

No Louisiana jurisprudence has interpreted the substance of the Louisiana Act. However, Louisiana's Electronic Surveillance Act was fashioned after its federal counterpart, 18 U.S.C. § 2510 et sequitur, known as Title III's Omnibus Crime Control and Safe Streets Act, and federal law is instructive in the areas where the provisional language coincides.

In the present case, two important constitutional rights conflict. The First Amendment to the United States Constitution and Article 1, Section 7 of the Louisiana Constitution protect the public's right of access to information of legitimate public interest and to a free press. The Fourth Amendment to the United States Constitution and Article 1, Section 5 of the Louisiana Constitution protect an individual's right to conversational privacy. *See Katz v. United States*, 389 U.S. 347 (1967). However, neither right is absolute; each is qualified. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (first amendment); *Berger v. New York*, 388 U.S. 41 (1967) (fourth amendment). What is required in this case is a careful balancing of the public's interest in access and of freedom of the press against the individual's privacy interests.

We find the case of *Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell Douglas Corporation v. The Pulitzer Publishing Company*, 895 F.2d 460 (U.S. 8th Cir. (Mo.) 1990), *cert denied*, 498 U.S. 880 (1990), most compelling and instructive in deciding this constitutionality issue of first instance in Louisiana. In *Pulitzer Publishing*, the newspaper sought access to FBI affidavits which were attached to applications for search warrants issued in a federal investigation. The FBI's affidavit was based in large part upon telephone conversations that had been intercepted pursuant to court-ordered wiretaps. The individuals under investigation argued that their privacy rights outweighed the public's interest in access to the information and that Title III, 18 U.S.C.A. § 2510 et seq, protected the materials from disclosure because the materials contain intercepted communications.

The federal statute authorizes wiretaps by law enforcement officers and 18 U.S.C. § 2517(2) authorizes the limited use of the contents in search warrants in order to establish probable cause to search. Other sections of the federal statute provide that properly obtained wiretap information must be sealed

but can subsequently be disclosed through testimony under oath. In finding against the newspaper, the court made it clear that the statute authorized disclosure only between agents in the performance of their duties and while giving testimony. The court in *Pulitzer Publishing* upheld the privacy rights of the intercepted individuals, and its reasoning, as follows, is particularly pertinent under the facts of this case:

> Nonetheless, disclosure to a limited audience of "professionally interested strangers" in the context of their official duties is not the equivalent to disclosure to the public. Title III does not allow public disclosure of all lawfully obtained wiretap evidence just because a few officers are privy to its contents; if this were construed to do so, much of the statute would be superfluous.... We do not agree that once wiretap information is used in search warrant affidavits, it is no longer subject to Title III's restrictions upon its use and disclosure. We do not think that Title III's restrictions can be so easily avoided. The use and disclosure of wiretap information in search warrant affidavits pursuant to 18 U.S.C. 2517(2) cannot transform the wiretap information into non-wiretap information unprotected by Title III. Acceptance of this argument would create a very large loophole in Title III.

Pulitzer Publishing, 895 F.2d at 465.

Similarly, in the present case, once the plaintiffs' communications were intercepted and used by Aymond, that initial disclosure did not transform the intercepted communications into non-intercepted communications unprotected by Louisiana's Title 15.

Moreover, the allegedly illegal nature of the interceptions in this case should entitle the plaintiffs to even greater protection than those afforded the investigated individuals in *Pulitzer Publishing*.

In balancing the public's and the newspaper's right of access against the individual's right of conversational privacy, the *Pulitzer Publishing* court stated that the absence of an indictment against the individuals was critical because where no indictments had issued against persons allegedly involved in criminal activity, there was a clear suggestion that the Government could not prove the allegations. The court stated that "The court of public opinion is not the place to seek to prove them." *Id.* at 466. The court further articulated:

> Moreover, in the absence of an indictment and a pending criminal trial, individuals whose wiretapped conversations are disclosed have no judicial forum in which they may potentially vindicate themselves or their conduct. Without an indictment, there can be no trial and, from their perspective, no acquittal. Thus, [w]here privacy interests in wiretapped conversations are asserted, the court must consider how disclosure of the information would affect the persons identified and society's interest in disclosure. A number of factors enter into this analysis, including the extent of public knowledge of the material, the accusatorial nature of the material, and the need for public scrutiny of the government operations disclosed in the material....

Id. at 467.

In the present case, the record contains no evidence that government operations were involved or that the wiretap was legally obtained by law enforcement officers during an investigation. The allegation is that the interceptions were illegally obtained by private citizens. If covert activity was suspected, a legal wiretap should have been ordered, and even that would have been afforded protection. Hence, there is no legitimate public interest to be served by the newspaper's disclosure of the private conversations of the plaintiffs in this case. The plaintiffs had an expectation of privacy in their personal conversations that is clearly protected by the Fourth

Amendment to the United States Constitution and by Article 1, Section 5 of our state constitution. Therefore, there is no question that the Electronic Surveillance Act, La.R.S. 15:1301 et seq., which merely creates a method for enforcing the Fourth Amendment's and Article 1, Section 5's protection of conversational privacy, does not unconstitutionally impinge on any freedom of the press protections.

Neither the public nor the press has a right of access to private conversations between private individuals initiated in the privacy of their respective homes. This is particularly true when intercepted individuals have not been indicted for a crime and yet stand to have their reputations and careers seriously damaged by public opinion. We find that the protections against public disclosure of allegedly illegal interceptions in La.R.S. 15:1301 et seq are not only constitutional but are even more important than the protections of legally obtained wiretaps in the federal statute.

Our courts have made it clear that the media does not have unfettered rights of access or rights to publicize the contents of any audio and visual event it so desires without the consent of the parties involved just because the First Amendment and Article 1, Section 7 protect freedom of speech and freedom of the press. In *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562 (1977), the United States Supreme Court unequivocally articulated that the First and Fourteenth Amendments of the Constitution did not immunize a television broadcasting company when it broadcasted a performer's entire act without his consent. In balancing rights, the press is subject to the same restrictions which our law imposes on the general public. Indeed, the press "is responsible for abuse of [the] freedom" given to it. La. Const., art. 1, § 7.

In *California First Amendment Coalition v. Calderon*, 97-15493 (9th Cir. (Cal.) 7/23/98); 150 F.3d 976, a coalition of press and broadcast journalists challenged the exclusion of

witnesses from certain phases of lethal injection executions. There, the prison's Procedure 770 was under attack. It prohibited the public viewing of officials escorting an inmate to the chamber, strapping him to the gurney, and inserting the IV tubes, but allowed observation beginning at the time the lethal drug was running through the IV. Procedure 770 minimized the exposure of the members of the execution team to the media or other witnesses out of concern for staff safety and institutional security. In upholding prison Procedure 770, the court articulated that the First Amendment does not protect the right of the press to gather news not available to the public.

The court's reasoning in *Calderon* is particularly germane to this case. In *Calderon*, the court stated that the right of the press to gather news and information is protected by the First Amendment in order to prevent freedom of the press from being eviscerated. However, the court made it clear that, "[a]lthough substantial, the protection is not without limits. For example, the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Calderon*, 150 F.3d at 981, citing *Branzburg v. Hayes*, 408 U.S. 665 (1972). The *Calderon* court then cited other Supreme Court cases limiting the press in its access to inmates. In all cases, the courts found that because the challenged policies did not deny the press access to sources of information available to members of the general public, those policies did not violate the First Amendment. The court expressed its agreement that executions are matters of great public importance, and that more information leads to a better informed public. It further articulated its acknowledgment that the role of the media is important and that, acting as the eyes and ears of the public, it can be a powerful and constructive force, contributing to remedial action in the conduct of public business.

However, the court poignantly observed that "the First Amendment does not protect the right of the press to gather news not available to the public" and that holding is "not predicated upon the importance or degree of interest in the matter reported." Succinctly stated, the press has no First Amendment right of access greater than that of the public. *Id.* at 982. Similarly, in the present case, the public at large has no right of access to private telephone conversations between individual citizens, and the Louisiana Electronic Surveillance Act further prohibits such access through interception, use and disclosure. Accordingly, those prohibitions are constitutional and are extended to the press. The press cannot escape the prohibitions of the Louisiana Electronic Surveillance Act under the guise of constitutional protection. We find that La.R.S. 15:1301 et seq should be stringently enforced and construed against the violator of any of its sections pursuant to a literal interpretation of the statute as set forth more fully below.

Criminality Is Not Required Under All Sections of The Louisiana Act

The trial court determined that, because an Assistant Attorney General stated in a prior proceeding that he "felt there was no way" to find criminal behavior on the part of the newspapers in printing the contents of the audiotapes, there could also be no civil remedy against Avoyelles Publishing. We disagree. We find that the statutes address criminal and civil violators and provide for criminal and civil penalties. We further find that the illegal interceptor is a criminal violator and is also subject to civil penalties, while the secondary user of the information may be liable criminally and civilly or only civilly depending upon the circumstances surrounding his use of the information. Accordingly, we find that the trial court erred in holding that criminal willfulness must exist on the part of the defendant newspaper before the plaintiffs can claim a civil remedy under La.R.S. 15:1312. Hence, the newspaper can be held civilly liable for publishing

the contents of the taped conversation, even if it was not charged in a criminal proceeding or even if the elements of criminal willfulness are lacking.

As stated, Louisiana's Electronic Surveillance Act was fashioned after its federal counterpart, 18 U.S.C. § 2510 et sequitur. However, it is important to note that Louisiana did not adopt many of the provisions of the federal act, and the language varies significantly between the two acts, as do the penalties mandated by each. Therefore, while the defendant newspaper seeks to analogize federal cases interpreting the federal act, we must compare the pertinent language in the applicable provisions before taking instruction from federal cases.

La.R.S. 15:1303 And Federal Statute 18 U.S.C. § 2511

Generally, La.R.S. 15:1303 provides that it is unlawful to willfully intercept a wire or oral communication without color of law and the consent of one of the parties to the communication; and it is illegal to willfully disclose or use the contents of the communication if there is reason to know that it was illegally obtained. Section 1303 does provide for criminal penalties up to $10,000 and imprisonment between two and ten years at hard labor. More specifically, section 1303 provides in pertinent part:

> Section 1303. Interception and disclosure of wire, electronic, or oral communications:
> A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:
> (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;
> (2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication ...

(3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection ; or
(4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.
B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor, without benefit of probation, parole, or suspension of sentence. (Emphasis added)

Therefore, section 1303 of Louisiana's Electronic Surveillance Act does provide for criminal penalties and imprisonment, but only for violations under "this Section," that is section 1303. The District Attorney's office has not filed criminal charges in this matter. It is clear from the record that the trial court based its dismissals of the civil suits against Central Newspapers, Inc., and of Avoyelles Publishing on its finding of a lack of criminal intent. More specifically, in the trial court's "Reasons for Ruling" wherein it granted the Exception of No Cause of Action filed by Central Newspapers, the court referenced a prior proceeding, "In Re: A Matter Under Investigation." There, the trial court took cognizance of statements made by a Louisiana Assistant Attorney General indicating that he "felt there was no way" that the State of Louisiana could establish criminal intent on the part of any of the newspapers.

Again, in its Judgment denying the State's Motion to Compel and the Bunkie newspaper's Motion to Quash, the trial court articulated that the "publication of information disclosed at the press conferences" was "not a disclosure as described in Louisiana Revised Statute 15:1303(A)(3)."

Hence, it is clear from the court's two prior judgments that it found no criminal disclosure by the newspapers, and used that as a basis for dismissing civil liability claims against them. However, the trial court erred in interpreting the law when it found that all sections of the Act required criminal intent.

Since no Louisiana jurisprudence interprets the Louisiana Act, the defendants cite only federal cases interpreting 18 U.S.C. § 2510 et seq. More particularly, the federal counterpart of La.R.S. 15:1303 above is 18 U.S.C. § 2511, which prohibits the "intentional" interception, disclosure and use of private conversations except by law enforcement officers pursuant to court orders.[1]

The federal statute, 18 U.S.C. § 2511, provides for civil fines of $500 in some instances or imprisonment of up to five years, or both; while the Louisiana statute provides for a fine up to $10,000 and imprisonment of not less than two years and up to ten years. Moreover, the federal statute provides for various levels of offenses, while the Louisiana statute does not. The Louisiana statute carries more stringent penalties and is broader, as more fully explained below. As stated, we find that the Louisiana statute, while it may follow some provisions of the federal statute, is not an adoption of the federal statute. Federal jurisprudence is not controlling but is instructive in certain limited circumstances.

In our previous decision, without determining specifically whether a criminal violation was required, we reversed the Exception of No Cause of Action granted to Central Newspapers, finding that the plaintiffs had stated a cause of action "under the literal language of the Electronic

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[1] The federal statute, section 2511, uses the word "intentionally" rather than "willfully," as seen in Louisiana section 1303, due to the United States Congressional amendment to 2511 in 1986, substituting the word "intentionally" wherever the word "willfully" had been used.

Surveillance Act." *Johnson v Aymond*, 709 So.2d at 1075. At the present time, in reversing the summary judgment granted to Avoyelles Publishing, we specifically hold for the following reasons that criminal intent is not a requirement under all sections of the Louisiana Electronic Surveillance Act and that, as a matter of law, the defendants may be held liable under the Act. More specifically, neither La.R.S. 15:1312 nor La.R.S. 15:1307 requires criminal intent or provides for criminal penalties or imprisonment. Further, section 1307 specifies that "broadcasting" and "publishing" the contents of intercepted communications is prohibited.

La.R.S. 15:1307 Prohibits Use for Broadcasting and Publishing; Federal Statute, 18 U.S.C. § 2515 Does Not

Louisiana Revised Statute 15:1307 provides that the contents of illegally intercepted communications cannot be used as evidence in a court or legislative proceeding and cannot be broadcasted or published. This section, however, does not provide for a specific remedy when the section is violated. Section 1307 provides in pertinent part:

> 1307. Prohibition of use as evidence or intercepted wire or oral communications
> A. Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this Chapter.
> B. No person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation of the provisions of this Chapter unless such dissemination or distribution is made to an investigator or law enforcement officer

conducting an investigation into a violation of the provisions of this Section.

The words "willful" and "intentional" do not appear in section 1307. Hence, there are no criminal elements necessary for a violation of the Act under section 1307, which prohibits the uses of illegally intercepted conversations in court or legislative proceedings and in broadcasts or publications. The federal statute on the other hand, 18 U.S.C. § 2515, does not contain subsection B's prohibition against broadcasting or publishing the contents of an intercepted conversation. The federal counterpart provides only:

18 U.S.C. 2515. Prohibition of use as evidence of intercepted wire or oral communications
Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The federal statute's omission and Louisiana's inclusion of a specific prohibition against broadcasting and publishing illegally intercepted information indicates that the Louisiana legislators anticipated a separate and distinct use of intercepted information not contemplated by the federal statute.

The courts have indicated that these second "uses" of illegally obtained information are prohibited to all, lest the intended protection of our privacy rights have no effect and the statutory proscription of such disclosures are rendered impotent for their intended purpose. In *Gelbard v. United States*, 408 U.S. 41 (1972), the United States Supreme Court

exhaustively reviewed the legislative history of the federal counterpart of Louisiana's section 1307 and concluded that "the protection of privacy was an overriding congressional concern" when it enacted the federal statute, and that 18 U.S.C. § 2515's "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." *Gelbard*, 408 U.S. at 50.

The *Gelbard* Court reversed contempt findings against witnesses who refused to testify in court to the contents of intercepted conversations. The Court recognized that an invasion of privacy does not end when an interception occurs, but is compounded by disclosures in court or elsewhere. The Court reasoned that the testimony of witnesses compounds the statutorily proscribed invasion of privacy by adding to the injury of the interception the insult of disclosure. Similarly, in the present case, the impact of this second invasion of privacy by Avoyelles Publishing is not lessened by the circumstances that the disclosing party is merely the recipient of a communication illegally intercepted by an allegedly guilty interceptor.

The *Gelbard* Court made it clear that Title III makes illegal not only unauthorized interceptions but also the disclosure and use of information obtained through such interceptions. Otherwise, the witness becomes the victim, once again, of a federal crime. *Gelbard* went on to articulate that even the prosecutor who pursues unchecked a course of conduct involving the use of intercepted communications can subject himself to "heavy civil and criminal penalties." *Id.* at 52. In Louisiana, prosecutors, attorneys, courts, newspapers, and entities "disclosing" and "using" illegally intercepted information under La.R.S. 15:1303 are all subject to criminal penalties and imprisonment if they disclose or use the information knowing or having reason to know that it was illegally obtained. However, we also find that these "second users" can be liable for civil penalties under section 1312 without the imprisonment mandated in section 1303. Again,

Louisiana's inclusion of a particular violation for broadcasting and publishing this information in a section that does not mandate imprisonment or use the terminology associated with criminal intent, distinguishes the Louisiana statutes from the federal statutes and cases interpreting them.

A literal reading of the statute is mandated by La.Civ.Code art. 9, which instructs that when the law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. We find that the Louisiana statute is clear and unambiguous, and susceptible of a literal interpretation.

Both plaintiffs have alleged use and publication by the defendant of intercepted communications and have submitted affidavits that they never gave authority or consent for any communication between them to be intercepted, taped, disseminated or published, or used in any way. The defendants, however, have not submitted any rebuttal evidence and in fact have not denied that the contents of the communications were published; instead, publication is impliedly conceded. On the face of section 1307, and under a literal interpretation of that section, the plaintiffs need do no more than prove publication in order to prevail at trial against the defendant newspapers for a violation of section 1307 B.

While summary judgments are now favored to secure a just and speedy determination of actions, pursuant to the 1996 amendment to La.Code Civ.P. art. 966, the burden of proof has not changed. The initial burden is still on the mover, who must show that there is no genuine issue as to material fact and that the mover is entitled to summary judgment as a matter of law. Only after the mover has met its initial burden of production must the opposition submit evidence showing the existence of specific facts establishing a genuine issue of material fact effectively shifting the burden of production to the non-moving party. *Pellerin v. Thibodeaux*, 98-181 (La.App.

3 Cir. 6/17/98); 716 So.2d 131. We find that Avoyelles Publishing has not met its initial burden and is not entitled to summary judgment.

La.R.S. 15:1312 Provides for Civil Damages Without Criminal Willfulness;
Federal Statute, 18 U.S.C. § 2520, Requires Intent

Louisiana Revised Statutes 15:1312 provides no criteria for criminal "willfulness" but only provides for recovery of civil damages, including attorney fees and punitive damages, to persons whose communications have been intercepted without consent of either party. More specifically, Louisiana's section 1312 provides in pertinent part:

> 1312. Recovery of civil damages authorized
> A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and be entitled to recover from any such person:
> (1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater.
> (2) A reasonable attorney's fee and other litigation costs reasonably incurred.
> (3) Punitive damages.
> B. A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this Chapter.

The defendants cite *Malouche v. JH Management Co., Inc.*, 839 F.2d 1024 (4th Cir. 1988), which held that civil liability for unlawful wiretapping under the federal counterpart to Louisiana section 1312, which is 18 U.S.C. § 2520, required proof of criminal willfulness. *Malouche* found that the plaintiff

had only "very slight" evidence supporting the factual allegations that his office phone was tapped by the defendant, no evidence as to who installed the device or why, and no evidence that the defendant had knowledge or criminal willfulness under pre-1986 federal statute 18 U.S.C. § 2511. In the present case, the alleged interceptor called a press conference, played the tapes, and handed out hard-copy transcriptions of the tapes. Hence, *Malouche* is distinguishable where it involved only the alleged criminal interceptor, and did not involve the mere "user" of the previously intercepted information.

Moreover, neither *Malouche* nor 18 U.S.C. § 2520 is controlling in this case, where the language of the federal statute, section 2520, is different from the language of the Louisiana statute. More specifically, the federal statute provides in pertinent part:

> 18 U.S.C. 2520. Recovery of civil damages authorized
> (a) In general.–Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate....

while the Louisiana statute, as previously indicated, provides

> 1312. Recovery of civil damages authorized
> A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and be entitled to recover from any such person ...

Hence, while the federal statute requires an "intentional use," the Louisiana statute does not include the word "intentional" or "willful" in any part of section 1312 providing for civil remedy, but only requires "use." Moreover, federal section 2520 provides that the intercepted party may obtain a civil recovery from "the person" who engaged in the violation, indicating that a civil recovery may be available against the same party who unlawfully intercepted the conversation. As stated, the federal statute does not contain a separately proscribed violation for "publishing" contents illegally obtained by another, while in Louisiana, the publisher and the interceptor can clearly be different parties. This is supported by the language in Louisiana's section 1312 providing that the aggrieved party shall have a civil remedy against "any" person who intercepts or discloses, or uses, the communication, not just "the" person who engaged in the interception.

There exists no Louisiana jurisprudence defining "disclosure" and "use" of the contents of intercepted information under section 1312. Webster's Ninth New Collegiate Dictionary defines disclosure as "exposure," "the act of disclosing;" and defines "disclose" as "to expose to view," "to make known or public." There is no requirement in sections 1303, 1307, or 1312 that the disclosure or use of the contents of the illegally obtained communication must be a first or initial disclosure. In this court's view, there is no tenable argument that would convince this court that a newspaper publication does not make information "known or public." Any argument that attempts to show that a newspaper publication does not disclose or expose information to view is not grounded in logic.

The record indicates that this newspaper defendant disclosed the contents of the subject communications to the public at large, even though its disclosures were secondary to the alleged initial disclosure by Aymond to the press. Likewise, when the newspapers took the information and printed it, they did not merely report allegations made at a recent press

conference based upon taped conversations between the plaintiffs; they "used" the contents to sell papers, to solicit advertisements, and for any other uses a paper makes of the information it gathers. Hence, the press's publication of the intercepted information is a "use" and a "disclosure" under sections 1307 and 1312.

Therefore, under a literal interpretation of the Louisiana statute, sections 1307 and 1312, the plaintiffs, Keller and Johnson, may have civil remedies available to them against the newspapers for publishing the contents of their conversation without the necessity of a finding of criminality leading to imprisonment under section 1303. The civil damages under section 1312 are clear and unambiguous, and include actual damages, reasonable attorney fees, and punitive damages. Accordingly, we find that as a matter of law, Avoyelles Publishing is not entitled to summary judgment under sections 1307 and 1312 where criminal willfulness is not required.

As to the "willful" use and disclosure under section 1303 resulting in criminal penalties and imprisonment, the plaintiffs in their Oppositions to the Avoyelles Publishing's Motion for Summary Judgment, attempt to show that the newspaper willfully and intentionally used the information in violation of section 1303. The word willful often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. It may generally mean in a criminal statute that the act was done with a bad purpose; without a justifiable excuse; or stubbornly, obstinately, or perversely. However, "willfully" is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act. *See United States v. Murdock*, 290 U.S. 389 (1933).

The plaintiffs have filed into the record an affidavit attesting that one reporter involved thought that the communications

handed out at the press conference were illegally intercepted. Such evidence creates an issue of fact as to the knowledge of the newspaper. Even without evidence of certain knowledge, the circumstances themselves create issues of fact wherein it seems that any reporter handed an audiotape and transcript of a private conversation between parties not in attendance would have "reason to know" that the communications were obtained without consent. Accordingly, summary judgment in favor of Avoyelles Publishing under section 1303 is not appropriate.

IV.
CONCLUSION

Accordingly, we reverse the summary judgment granted by the trial court to Avoyelles Publishing, and we find that as a matter of law, criminal willfulness is not a requirement for civil damages under La.R.S. 15:1312 for "secondary" disclosures and publication of previously intercepted communications under La.R.S. 15:1307. We also find that issues of fact exist regarding the newspaper's "willfulness" of conduct, and its "knowledge" or "reason to know" that the information it published was illegally obtained, precluding summary judgment under La. R.S. 15:1303. Finally, we find that La.R.S. 15:1301 et sequitur violates neither the federal nor state constitutional guarantee of freedom of the press.

We remand for further proceedings.

All costs shall be cast against the defendants-appellees.

REVERSED AND REMANDED.

APPENDIX B — STATE TRIAL COURT'S REASONS FOR RULING DATED AUGUST 12, 1997

CIVIL SUIT NUMBER 96-3590-B

MICHAEL J. JOHNSON

VERSUS

CAROL AYMOND, JR., ET AL

12TH JUDICIAL DISTRICT COURT
PARISH OF AVOYELLES
STATE OF LOUISIANA

REASONS FOR RULING

This cause came up for hearing on July 18, 1997 on preemptory Exceptions of No Cause of Action filed by Central Newspapers, Inc.

1. BACKGROUND:

The two separate petitions filed by the two separate plaintiffs contain the following allegations against Central Newspapers, Inc.

1) Paragraph Six of the petition states that on November 7, 1996 Central Newspapers, Inc. did illegally publish and/or use the contents of illegally intercepted wire or oral communications by printing a news article, written by its reporter, Steve Banister, containing quotes from the illegally intercepted communications.

2) Paragraph Ten alleges that all of the defendants have violated R. S. 15: 1303A(4) and R. S. 15: 1307.

3) Paragraph Twelve alleges that Central Newspapers, Inc. acted with malice by publishing the contents of an illegally intercepted communication. (The Johnson lawsuit also includes a claim against Central Newspapers, Inc. for refusal to accept paid political advertisements in September of 1996 from plaintiff, Michael Johnson. This claim has been dismissed with prejudice by Michael Johnson pursuant to oral Motion made on July 18, 1997).

The question presented to this court is whether or not the law affords a remedy to plaintiff based on the facts as alleged to plaintiffs in their petitions. The Court is to review the petition and accept all well plead facts as true.

Exceptor contends that R. S. 15:1301, et. seq., (the Louisiana Electronic Surveillance Act), makes it unlawful to disclose the contents of wire or oral communications but does not bar the publication or broadcast of an illegally taped telephoned conversation after that conversation has already been disclosed by another party. Exceptor contends that as long as the reporter or publisher does not cooperate with the perpetrator of the crime, then the act of repeating the disclosure by publishing or broadcasting should not be deemed a violation of the statute.

Plaintiffs have filed Memorandum in Opposition to the Peremptory Exception of No Cause of Action. Plaintiffs contend that they have the full right to expect privacy in their home. Plaintiffs contend that if this Court is correct in a previous ruling, then once the disclosure has been made, illegally taped conversations would be played at news conferences, published in newspapers and broadcasts, and therefore, R. S. 15:1301, et. seq. would be meaningless.

Plaintiffs contend that all the disseminator would need to do to avoid application of R. S. 15:1301, et. seq. is to state that he received the tape anonymously.

Plaintiffs contend that R. S. 15:1307(B) is applicable to the claims against Central Newspapers, Inc. R. S. 15:1307(B) prohibits any person from publishing or disseminating or otherwise distributing any part of the content of an electronic communication intercepted in violation of the Louisiana Electronic Surveillance Act unless the dissemination or distribution is made to a law enforcement officer. Plaintiffs also contend that R. S. 15:3030A(4) is applicable to the claims against Central Newspapers, Inc. R. S. 15:1303A(4) prohibits any person to willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained in violation of the Louisiana Electronics Surveillance Act.

Plaintiff have also urged the court to reconsider its prior ruling wherein plaintiffs claim that this Court held that "Carol Aymond's dissemination of an illegally taped conversation was legal and protected by statutory provisions". Plaintiffs also contend that the only inquiry is whether the State of Louisiana has the constitutional authority to restrict the press by prohibiting the media from publishing or broadcasting the contents of an illegally intercepted conversation. Plaintiffs contend that the newspaper was not prohibited from printing the fact that there was a press conference and that fact that there were tapes and allegations of possible wrong doing being discussed on the tapes. However, plaintiffs allege that it serves the public no good to go into the specifics of the tapes.

In argument, plaintiffs contend that the Petition states a cause of action pursuant to the literal reading of R. S. 15:1307(B) and 1303A(4). Plaintiffs contend that their Petition against Central Newspapers, Inc. should be dismissed only in the event that the Court finds portions of the statute to be unconstitutional. Plaintiffs allege that this statute is totally constitutional.

In argument, Central Newspapers, Inc. contends that their publication of the contents of the news conference of November 6, 1996 and their publication of the contents of the taped conversation allegedly between Michael Johnson and McKinley Keller is not a violation of Louisiana Electronic Surveillance Act.

The court allowed Central Newspapers, Inc. one week within which to submit further Memorandum with specific instruction that Memorandum should be issued concerning the criminality versus civility of the Louisiana Electronic Surveillance Act, and further granted to plaintiffs one week thereafter to respond. Memorandum have been received from Central Newspapers, Inc. and from both plaintiffs.

II. DISCUSSION OF PRIOR RULINGS:

The Laws relating to electronic surveillance were originally enacted by the legislature in 1980. The provisions of the act establishing laws relative to electronic surveillance provided that the act would expire on July 1, 1984. The legislature thereafter, in 1985, re-enacted legislation regulating electronic surveillance with an effective date of July 23, 1985. The purpose of the act was to provide definitions, procedures, terms, conditions, and effects of certain electronic surveillance and provide definitions and penalties, and to provide certain civil remedies for violation of the act, and to provide for related matters. (Acts, 1985 No. 859)

R. S. 15:1303 is a criminal statute. It provides that "it shall be unlawful for any person to..." R. S. 15:1307 prohibits the use of intercepted communications in evidence and/or prohibits use via broadcast, publication, dissemination or otherwise. R. S. 15:1312 provides a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose or use such communications (intercepted communications).

On May 7, 1997 in a proceeding in this Court entitled "In Re: A Matter Under Investigation", this Court took cognizance of statements made by the Assistant Attorney General of the State of Louisiana indicating that he felt there was no way that the State of Louisiana could establish any criminal intent on the part of any of the newspapers and that in his opinion, the newspaper did not violate R. S. 15:1301, et. seq. in any fashion. This Court also considered Memorandum and argument. The newspapers contended in their argument that the act of publishing after someone had already disclosed is not itself a violation of the statute. The newspapers contended that since someone else had completed the crime by disclosing, that for a newspaper to then take that public information and publish it is not to disclose.

Quoting from this Court's opinion in that hearing, this Court stated that

> "without question, in my mind, what these newspapers and television stations were doing, were merely reporting news. It was definitely news worthy. Without question, the definition of disclosure is to expose or make known. The information which was reported was exposed or made known at the press conference. It was not exposed or made known by the newspapers of the televisions stations".

This Court further stated that

> "it had already been disclosed. Certainly, once it is disclosed, if you tell the newspaper or television station that they cannot report it, you are definitely violating their constitutional rights".

The specific holding of the Court was that the publication of the information disclosed at the two press conferences was not in violation of R. S. 15:1301, et. seq., based on the prior

disclosure. The information published in the newspapers was disclosed or made known by a person other than the newspaper reporters at a press conference and once disclosure was made, this Court held that the newspapers had a constitutional right and constitution protection to report the information that was divulged and disclosed at the press conference by someone else.

In this proceeding, this Court issued Written Reasons for Judgment on May 20, 1997 concerning an Exception of Unconstitutionality as filed by Carol Aymond. The specific ruling of this Court was as follows:

a) Persons do have the right to expect privacy.

b) R. S. 15:1301, et. seq. is constitutional in that it makes it unlawful for any person to intercept a wire communication without proper authorization, and therefore it stands to reason that it should be unlawful for any person to wilfully disclose the contents of the illegally intercepted communication.

c) The criminal penalty provisions were cruel and unusual and this provision of the statute is unconstitutional.

d) If a person happens upon tapes of conversations between public officials, and if these tapes contain discussion of illegal activity, then disclosure is proper and R. S. 15:1301 et. seq. is unconstitutional as it would apply to that situation.

e) This Court HAS NOT issued an opinion that Carol Aymond's alleged dissemination of the taped conversation between plaintiffs was legal. This Court has held that if the conversations between two public officials discusses illegal activity, then that disclosure is protected. The merits will decide that issue.

All parties agree that on November 6, 1996 Carol Aymond played a tape of a telephone conversation allegedly between Michael Johnson and McKinley Keller. This was done at a news conference at the law office of Carol Aymond allegedly attended by a handful of people, including the news media. Carol Aymond is an attorney. This Court has previously held that this was a disclosure as contemplated by R. S. 15:1301, et. seq. This Court has previously held that once this information was disclosed, any restrictions upon the newspaper from reporting this disclosure would be a violation of the constitutional right of freedom of press. After consideration of all Memorandum and much thought and deliberation, this Court is convinced more than ever that the prior holding was and is correct.

III. RULING:

The petition filed by plaintiffs does state a cause of action based on a literal reading of the Electronic Surveillance Act, however, for two separate reasons the Exception filed by Central Newspapers, Inc. is proper and with full merit. These reasons are as follows:

1) Central Newspapers, Inc. published information which had already been disclosed. Central Newspapers, Inc. is not alleged to have intercepted the conversation nor aid the perpetrator. They did not violate the statute, therefore, there can be no civil cause of action.

2) Once the contents of the alleged illegally intercepted conversation was disclosed, prohibiting the newspapers from reporting this news would violate their constitutional rights.

Accordingly, the Peremptory Exception of No Cause of Action as filed by Central Newspapers, Inc. be and is hereby GRANTED.

Counsel for Central Newspapers, Inc. is to prepare formal Judgment to include the dismissal by plaintiff, Michael Johnson, of the claim for damages based on the allegation that Central Newspapers, Inc. failed to accept a paid political advertisement.

Marksville, this 12th day of August, 1997

WILLIAM J. BENNETT
12TH JUDICIAL DISTRICT COURT,
JUDGE
DIVISION B

APPENDIX C — LOUISIANA SUPREME COURT'S DENIAL OF CNI'S APPLICATION FOR WRIT OF CERTIORARI DECIDED APRIL 1, 1999

McKinley KELLER

v.

Carol AYMOND, Jr., et al, Consolidated with Michael J. Johnson,

v.

Carol AYMOND, Jr., et al.

No. 99-C-0199.

Supreme Court of Louisiana.

April 1, 1999.

IN RE: Central Newspaper Inc.;–Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Avoyelles 12th Judicial District Court Div. "B" Number 96-3590, 96-3663; to the Court of Appeal, Third Circuit, Number CA98-0844

Denied.

BJJ
WFM
CDK
CDT

CALOGERO, C.J., would grant the writ.
LEMMON, J. would grant the writ.
VICTORY, J. would grant the writ.
KNOLL, J. not on panel; recused.

APPENDIX D — LOUISIANA SUPREME COURT'S DENIAL OF AVOYELLES PUBLISHING COMPANY'S APPLICATION FOR WRIT OF CERTIORARI DECIDED APRIL 1, 1999

McKinley KELLER

v.

Carol AYMOND, Jr., et al, Consolidated with Michael J. Johnson

v.

Carol AYMOND, Jr., et al.

No. 99-C-0219.

Supreme Court of Louisiana.

April 1, 1999.

IN RE: Avoyelles Publishing Co.; Decuir, Randy;–Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CA98-0843, CA98-0844; Parish of Avoyelles 12th Judicial District Court Div. "B" Number 96-3590, 97-3663

Denied.

BJJ
WFM
CDK
CDT

CALOGERO, C.J., would grant the writ.
LEMMON, J. would grant the writ.
VICTORY, J. would grant the writ.
KNOLL, J. not on panel; recused.

APPENDIX E — DECISION OF THE LOUISIANA COURT OF APPEAL DECIDED APRIL 1, 1998

Michael J. JOHNSON, Plaintiff-Appellant,
v.
Carol AYMOND, Jr., et al., Defendant-Appellee.

No. 97-1466.

Court of Appeal of Louisiana,
Third Circuit.

April 1, 1998.

Before THIBODEAUX, COOKS and AMY, JJ.

AMY, Judge.

Plaintiffs[1] appeal the trial court's grant of an exception of no cause of action filed by Central Newspapers, Inc. We reverse.

DISCUSSION OF THE RECORD

Both McKinley Keller and Michael Johnson filed a petition for damages against several defendants, including Central Newspapers, Inc., for damages allegedly sustained by the publication and/or dissemination of the contents of an allegedly illegally intercepted communication between Keller

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[1] This case was consolidated with Keller v. Aymond, 97-1467 (La.App. 3 Cir. 4/1/98); 709 So.2d 1076. The plaintiff in the present case, 97-1466, is Michael J. Johnson. The plaintiff in the companion case, 97-1467, is McKinley Keller. We discuss both cases in this opinion.

and Johnson. Plaintiffs suits have been consolidated on appeal.

According to the allegations of those lawsuits, Carol Aymond, Jr., one of the named defendants, allegedly recorded a telephone conversation between Keller and Johnson, as well as a conversation between Keller and several other public officials. On November 6, 1997, Aymond called a press conference at which he distributed a purported transcript of the Keller/Johnson conversation to reporters and spectators. The following day, November 7, 1997, Aymond mailed a copy of the conversation to the special counsel to the Louisiana Judiciary Commission. It is further alleged that over the next few days, various news articles were published containing excerpts from the communication between Keller and Johnson which was alleged to have been illegally intercepted. These news articles are the focus of concern for the plaintiffs who have brought suit against the remaining defendants, including Central Newspapers, Inc. Further, according to the allegations, a second press conference was held on November 13, 1997 at Aymond's office, during which a transcript of the conversation between Keller and the other public officials was distributed. From the record, it appears that the contents of this second transcript were never reproduced by the media.

Central Newspapers, Inc. filed a peremptory exception of no cause of action contending that "the Electronic Surveillance Act [La.R.S. 15:1301, et seq.][2] does not bar the publication or

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[2] The relevant provisions of the Electronic Surveillance Act are La.R.S. 15:1303, La.R.S. 15:1307, and La.R.S. 15:1312. La.R.S. 15:1303 provides in pertinent part:
A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:

* * * * * *

broadcast of an allegedly illegally intercepted telephone conversation after that conversation has already been disclosed...."

The trial judge, in his reasons for ruling, stated:

III. RULING:

The petition filed by plaintiffs does state a cause of action based on a literal reading of the Electronic Surveillance Act, however, for two separate reasons the Exception filed by

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(4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.
La.R.S. 15:1307 provides in pertinent part:
B. No person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation of the provisions of this Chapter unless such dissemination or distribution is made to an investigator or law enforcement officer conducting an investigation into a violation of the provisions of this Section.
La.R.S. 15:1312 provides in pertinent part:
A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses or uses, ... such communications, and be entitled to recover from any such person:
(1) Actual damages....
(2) A reasonable attorney's fee and other litigation costs reasonably incurred.
(3) Punitive damages.

Central Newspapers, Inc. is proper and with full merit. These reasons are as follows:

1) Central Newspapers, Inc. published information which had already been disclosed. Central Newspapers, Inc. is not alleged to have intercepted the conversation nor aid the perpetrator. They did not violate the statute, therefore, there can be no civil cause of action.

2) Once the contents of the alleged illegally intercepted conversation was disclosed, prohibiting the newspapers from reporting this news would violate their constitutional rights.

Accordingly, the Peremptory Exception of No Cause of Action as filed by Central Newspapers, Inc. be and is hereby GRANTED.

Plaintiffs appeal, assigning the following trial court errors: (1) trial court erred in dismissing their claims against Central Newspapers, Inc. after finding that the literal interpretation of the Electronic Surveillance Act does support a cause of action; and (2) the trial court erred in finding that to apply the Electronic Surveillance Act in this case would be unconstitutional.

MERITS

First, we address the trial court's ruling which essentially declared the Electronic Surveillance Act unconstitutional as applied to the actions of Central Newspapers, Inc. It is unclear from the limited record lodged in this appeal whether the trial court considered on its own motion the constitutionality of the Electronic Surveillance Act as it applied to this defendant or whether said consideration was a result of language contained in plaintiffs' memorandum in opposition to defendant's exception.[3] Regardless, we find

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[3] In written reasons for judgment, the trial judge refers to a memorandum in opposition filed by the plaintiffs and that memorandum has been attached by the plaintiffs to their

that consideration of the constitutionality of the Electronic Surveillance Act by the trial court was error.

The Louisiana Supreme Court, in the case of *Vallo v. Gayle Oil Co., Inc.*, 94-1238, p. 8 (La.11/30/94); 646 So.2d 859, 864-65, stated:

> Our Code of Civil Procedure does not require a single procedure or type of proceeding for challenging or assailing the constitutionality of a statute. However, the long-standing jurisprudential rule of law is: a statute must first be questioned in the trial court, not the appellate courts, and the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. [Citations omitted].
>
> The pleadings allowed in civil actions are petitions, exceptions, written motions and answers. LSA-C.C.P. art. 852. Therefore, when the unconstitutionality of a statute is specifically pled, the claim must be raised in a petition (the original petition, an amended and supplemental petition or a petition in an incidental demand), an exception, a motion or an answer. It cannot be raised in a memorandum, opposition or brief as those documents do not constitute pleadings.

(Emphasis added).

Further, when considering the constitutionality of a statute, the supreme court, exercising the policy of judicial self-restraint, recognizes the general presumption of a

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appellate briefs. However, the memorandum does not likewise appear in the record presented to this court for review. Accordingly, plaintiffs' memorandum provided to the trial court but not filed in the record is not part of the record on appeal and will not be considered. *Stacks v. Mayflower Transit, Inc.*, 95-693 (La.App. 3 Cir. 11/2/95); 664 So.2d 566; *Tranum v. Hebert*, 581 So.2d 1023 (La.App. 1 Cir.), *writ denied*, 584 So.2d 1169 (La.1991).

statute's constitutionality. *Brown v. State, Dep't of Pub. Safety & Corrections*, 96-2204 (La.10/15/96); 680 So.2d 1179. The attacker to the statute's constitutionality bears the burden of proving specific constitutional infirmities. *Id.* The only time a court has the authority to raise the issue of the constitutionality of a statute on its own motion is "when that statute interferes with or curtails the plenary power vested in the court by the state constitution." *City of Baton Rouge, v. Stauffer Chem. Co.*, 500 So.2d 397, 400 n. 7 (La.1987); *see also Vaughn v. State, Dep't of Pub. Safety & Corrections*, 566 So.2d 1021 (La.App. 3 Cir.1990). Additionally, once the constitutionality of a statute is questioned, the attorney general must be notified by certified mail of the proceeding and, at his discretion, shall be allowed to represent the interest of the state. La.R.S. 13:4448. Because none of these procedures were observed, and the statute does not interfere with or curtail the plenary powers vested in the trial court by our constitution, the issue of constitutionality was not in proper posture for consideration.

Next, we consider the merits of Central Newspapers, Inc.'s exception of no cause of action. An appellate court, when measuring the legal sufficiency of a petition to state a cause of action, must ascertain, by looking only to the face of the petition, whether there are sufficient facts alleged to establish a case cognizable at law. *See Craft v. Allstate Ins. Co.*, 95-160 (La.App. 3 Cir. 8/30/95); 663 So.2d 116, *writ denied*, 95-2403 (La.12/15/95); 664 So.2d 454. For purposes of this determination, all allegations stated in the petition are accepted as true, and any doubts are resolved in favor of the sufficiency of the petition. *Weber v. State*, 93- 0062 (La.4/11/94); 635 So.2d 188.

After reviewing both petitions for damages, as did the trial court before us, we find that the allegations, when accepted as true, support a cause of action under the literal language of the Electronic Surveillance Act. See La.R.S. 15:1303(A)(4) and La.R.S. 15:1307(B). Accordingly, since we find the

petitions state a cause of action under the language of the statute, the matter is remanded to the trial court for further proceedings.

DECREE

For the foregoing reasons, the decision of the trial court sustaining Central Newspapers, Inc.'s exception of no cause of action is reversed. This matter is remanded to the Twelfth Judicial District Court for further proceedings. All costs associated with this consolidated appeal are assessed to the appellee, Central Newspapers, Inc.

REVERSED AND REMANDED.

APPENDIX F — LOUISIANA SUPREME COURT'S DENIAL OF CNI'S APPLICATION FOR WRIT OF CERTIORARI DECIDED JUNE 19, 1998

Michael J. JOHNSON
v.
Carol AYMOND, Jr., et al.
McKinley KELLER
v.
Carol AYMOND Jr., et al.

No. 98-C-1181.

Supreme Court of Louisiana.

June 19, 1998.

Prior report: La.App., 709 So.2d 1072.

In re Central Newspapers, Inc.;–Defendant(s); applying for writ of certiorari and/or review; Parish of Avoyelles, 12th Judicial District Court, Div. "B", Nos. 95-3590-B, 97-3663-B; to the Court of Appeal, Third Circuit, Nos. CA97-1466, CA97-1467.

Denied.

HTL
WFM
CDK
BJJ
CDT

CALOGERO, C.J. would grand the writ.
VICTORY, J., would grant the writ.
KNOLL, J., not on panel; recused.

APPENDIX G — RELEVANT PORTIONS OF THE LOUISIANA ELECTRONIC SURVEILLANCE ACT

§ 1303. Interception and disclosure of wire, electronic, or oral communications

A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:

(1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;

(2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication when:

(a) Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(b) Such device transmits communications by radio or interferes with the transmission of such communication;

(3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection; or

(4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.

B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and

imprisoned for not less than two years nor more than ten years at hard labor, without benefit of probation, parole, or suspension of sentence.

C. (1) It shall not be unlawful under this Chapter for an operator of a switchboard, or any officer, employee, or agent of any communications common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; however, such communications common carriers shall not utilize service observing or random monitoring, except for mechanical or service quality control checks.

(2) It shall not be unlawful under this Chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of Chapter 5 of Title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(3) It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. Such a person acting under color of law is authorized to possess equipment used under such circumstances.

(4) It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the

communication or where one of the parties to the communication has given prior consent to such interception,

unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the state or for the purpose of committing any other injurious act.

(5) It shall not be unlawful under this Chapter:

(a) For the ultimate receiver of wire or electronic communication, or an investigative or law enforcement officer to use a pen register or trap and trace device as provided in Part III of this Chapter.

(b) For a provider of electronic communication services to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, or another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

(c) To use a device which captures the incoming electronic or other impulses which identify the numbers of an instrument from which a wire communication was transmitted.

(6) A person or entity providing electronic communication services to the public shall not intentionally divulge the contents of any communication while in transmission of that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient except:

(a) As otherwise authorized by federal or state law.

(b) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination.

(c) Any electronic communication inadvertently obtained by the service provider and which appears to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

D. Upon receipt of the information or evidence sought by the interception, the interception shall cease.

§ 1307. Prohibition of use as evidence of intercepted wire or oral communications

A. Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this Chapter.

B. No person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation of the provisions of this Chapter unless such dissemination or distribution is made to an investigator or law enforcement officer conducting an investigation into a violation of the provisions of this Section.

§ 1312. Recovery of civil damages authorized

A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to

intercept, disclose, or use such communications, and be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater.

(2) A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Punitive damages.

B. A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this Chapter.

APPENDIX H — REPRODUCTION OF NOVEMBER 7, 1996 ARTICLE AS PRINTED IN THE *ALEXANDRIA DAILY TOWN*

Alexandria Daily Town Talk
CENLA
D
THURSDAY
NOVEMBER 7, 1996

Tape allegedly implicates judge

Attorney says he has given recording of Johnson to authorities

By Steve Bannister
Staff reporter

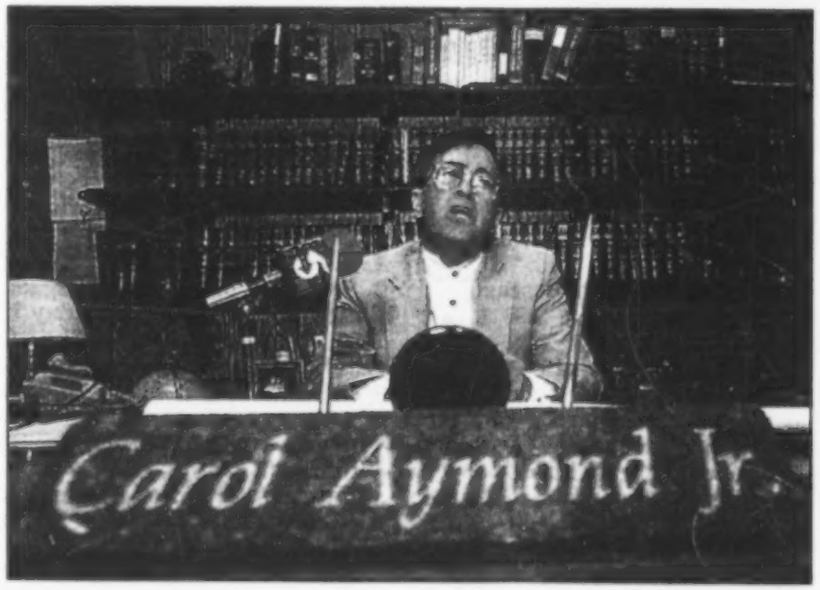
BUNKIE — Attorney Carol Aymond said Wednesday he has given federal authorities a tape-recorded conversation of 12th Judicial District Judge Mike Johnson that allegedly shows the level of corruption in Avoyelles Parish.

In the tape recording, Johnson allegedly talks about providing money to certain people on the eve of Tuesday's judicial election between attorneys Kerry Spruill and Billy Bennett, including what appears to be a reference to payments to local election officials.

In the taped conversation, which allegedly was with Avoyelles Parish Police Juror McKinley "Pop" Keller, Johnson also seems to describe his willingness to decide court cases the way Keller wants.

Johnson, who supported Spruill in the 12th Judicial District Judge Division B race, also allegedly said on the tape that he intends to punish attorney Michael Callahan for supporting Bennett.

Bennett defeated Spruill Tuesday by 56 percent to 44 percent Tuesday, according to complete but unofficial returns.



Todd Drumwright — Staff photographer

Bunkie attorney Carol Aymond Jr. holds a news conference in his office exposing an alleged tape recorded conversation between judge Mike Johnson and Avoyelles Parish police juror Pop Keller.

In a brief telephone interview Wednesday morning, Johnson said he was taped illegally and, in response to a reporter's question, said he had not engaged in vote buying.

When the reporter arrived at Johnson's office for a longer interview, he was greeted by attorney Keith Manuel, who announced he was representing Johnson and would have no comments before reviewing a transcript of the taped conversation.

Wednesday afternoon, Manuel left a brief statement through his receptionist in which he said he could not comment specifically about what was in the tape because he was still reviewing it and talking with Johnson.

But Manuel also said that "at no time has the judge ever engaged in any illegal activities or wrong doing."

Spruill, reached at home Wednesday evening, was unaware of the taped conversation. When asked about it, Spruill said he did not buy votes or authorize anyone to do that for him, saying he ran a hard, honest race and lost.

Keller said he had not heard the tape and did not remember having the conversation he is accused of having with Johnson. Keller also said he planned to hire an attorney to respond to questions.

When asked if he bought votes for Spruill, Keller answered: "I don't know anything about all this."

The questions began Wednesday morning when Aymond held a news conference in which he played the tape and passed out transcripts.

Aymond said the tape is of an Oct. 29 telephone conversation between Johnson and Keller. Aymond refused to say who recorded the conversation or how he came to possess the tape, saying that wasn't important and that the recording was made legally.

Aymond also said a few days ago that he provided the U.S. Attorney's Office with a copy of the tape. The U.S. Attorney's Office would not comment when asked about that.

The comments in the tape recording allegedly suggest, but do not prove, that Johnson and Keller were discussing buying votes for Spruill. Also, Aymond stopped short of accusing the men of that.

"It's clear to me what they're talking about but I'm not going to get into that," Aymond said.

Aymond did say that the tape proves there is corruption and a "judicial crisis" in the parish and that it's time for others to join with him in cleaning things up.

"I'll devote the rest of my life in seeing that wrongs like this are corrected," Aymond said.

Johnson won re-election in the Sept. 21 primary in a particularly

■ **Please see TAPE, D-4**

[November 7, 1996 Article - Continued]

Tape

■ Continued from D-1

bitter race in which Aymond was the only other candidate.

Aymond said Wednesday he called the news conference to let the public know what was going on in the parish and "stands to gain nothing" politically from doing that.

One of the issues in the race between Johnson and Aymond was the Louisiana Judiciary Commission's recommendation to the Louisiana Supreme Court that Johnson be removed from office for alleged ethical violations.

The Supreme Court heard the complaint last month but has not yet handed down its decision.

That issue allegedly came up in the taped conversation, with Johnson saying whatever action the Supreme Court takes will involve only his current term and not his new six-year term that begins in January.

Another part of the conversation allegedly involves a debt or bankruptcy case that involves John Small, someone Keller knows.

After Keller described the case, the following conversation allegedly ensued:

Johnson: "You tell John Small that whatever Pop Keller wants me to do, that's what's going to be done."

Keller: "Look son, I told him, I said, I can tell you this, I told John it's like this here, I said, I can just about speak for Judge Johnson and Judge Johnson can speak for Pop Keller."

Johnson: "100,000 percent."

Keller: "That what I told him, I said, I can tell you what's gone happen."

Johnson: "If that's in front of me."

Johnson then allegedly offered to sign papers in

the case over the weekend if Small's attorney would come to his office, telling Keller, "You tell them, 'Whatever Pop Keller wants is what Mike Johnson wants,' "

Later in the conversation Keller allegedly said that Callahan had sent out letters of support for Bennett in the black community.

Johnson allegedly responds: "Well, I told him after Jan. 1 he ain't got no job."

Keller and Johnson allegedly return to that topic later in the conversation, with Keller saying, "Well, chief, on Michael, we just won't do him any more favors."

To this, Johnson allegedly responds: "No, that ain't good enough Pop ... That's what we've been doing, that ain't good enough, we got to punish them."

The comments suggestive of vote buying are less specific than those about the other topics. The tape allegedly contains references to spending money and "taking care" of people, then continues with the following exchange:

"Johnson: "He's (Spruill) coming to my office tomorrow morning, I'll make sure he goes down there and sees him."

Keller: "OK, now when you're going to have the package so I can pick it up?"

Johnson: "I'm going to have it Thursday, when do you want it?"

Keller: "I uh."

Johnson: "We don't want to give it to them too soon."

Keller: "No, that's what I say. Well, if they get it up there on Saturday, that'll be a good day?"

Johnson: "I'll deliver your's Saturday."

Keller: "OK. Deliver it Saturday and I'll take care of it on Sunday or Monday."

Johnson: "Yeah, I don't want them to get it too soon."

Supreme Court, U.S.
FILED
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No. 99-42

In The

Supreme Court of the United States

CENTRAL NEWSPAPERS, INC.,

Petitioner,

v.

MICHAEL J. JOHNSON and McKINLEY KELLER,

Respondents.

On Petition For A Writ Of Certiorari To The Third Circuit Court Of Appeal Of The State Of Louisiana

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STATEMENT OF THE CASE

On or about December 3, 1996, Michael J. Johnson and McKinley Keller filed almost identical civil law suits in the 12th Judicial District Court in and for the Parish of Avoyelles, State of Louisiana, against defendants, Carol J. Aymond, Jr. Avoyelles Publishing Company, Randy Decuir, John Doe (also known as "Alphonse") and Central Newspapers, Inc. These civil law suits were later consolidated.

Concerning Aymond, Johnson alleged the following in his petition, to-wit:

Paragraph 3:

"On November 6, 1996, defendant, CAROL AYMOND, JR., conducted a press conference in his law office in Bunkie, Louisiana."

Paragraph 4:

"At said press conference, defendant CAROL AYMOND, JR., distributed and/or disseminated copies of an illegally taped telephone conversation between plaintiff and McKinley "Pop" Keller, as well as copies of purported transcripts thereof, to reporters and spectators."

Paragraph 5:

"On November 7, 1996, defendant CAROL AYMOND, JR. did distribute and/or disseminate the contents of this illegally intercepted communication by sending a copy of the recording and/or a copy of the transcript of said recording to Steven Scheckman, Special Counsel to the Louisiana Judiciary Commission."

Paragraphs 3, 4, and 5 state the allegations made against defendant, Aymond, by Michael J. Johnson and McKinley Keller. Mr. Keller also complained of a press conference of November 13, 1996.

Aymond filed **"EXCEPTION OF UNCONSTITUTIONALITY, AND IN THE ALTERNATIVE, EXCEPTIONS OF PREMATURITY, NO CAUSE OF ACTION AND/OR NO RIGHT OF ACTION, AND OF VAGUENESS".**

Aymond specifically alleged the unconstitutionality of LA. R.S. 15:1301, et seq.

The civil law suit was assigned to William J. Bennett, Judge, 12th Judicial District Court, Division "B", for the Parish of Avoyelles, State of Louisiana. Honorable William J. Bennett, set Exception of Unconstitutionality, Exceptions of Prematurity, No Cause of Action and/or No Right of Action, and of Vagueness, for hearing on March 21st, 1997.

On May 20th, 1997, Judge William J. Bennett, Division "B", 12th Judicial District Court, assigned Written Reason for Judgment concerning the Exceptions of Unconstitutionality, Prematurity, No Cause of Action and/or No Right of Action, and Vagueness.

The District Judge held the following concerning the Exception of Unconstitutionality, et seq., to-wit:

> **"The Exception of Unconstitutionality be and is hereby conditionally granted, dependent upon the specific facts of this case, which may be revealed at trial and therefore referred to the merits based on the following."**

The District Judge went on to say in his Reasons for Judgment, that the statute was unconstitutional as imposing cruel and unusual punishment (a mandatory sentence of 2 to 10 years without the benefit of probation or parole for each count), unconstitutional as to cellular and/or cordless telephones, and conditionally a violation of the First Amendment right to free speech if the activity and communications discloses illegal conduct on the part of the public officials (a district judge and an Avoyelles Parish Police Jury member).

Johnson and Keller, thereafter, filed a Motion and Order for Appeal, which was granted from the Judgment rendered on May 20th, 1997, in which the Court held that the statute was unconstitutional as imposing cruel and unusual punishment, unconstitutional as to cellular and/or cordless telephones, and unconstitutional as violative of rights to free speech if the activity discloses illegal conduct, as all set forth in the Motion and Order of Appeal by both Johnson and Keller.

In an Answer filed by Aymond, Aymond claimed and pled his 5th Amendment Rights against self-incrimination, and any and all rights guaranteed to him by the United States Constitution and the Louisiana Constitution. Additionally, Aymond made no admission of wrongdoing or violations of LA. R.S. 15:1301, et seq.

On November 19th, 1997, the Supreme Court of the State of Louisiana issued the following Order, to-wit:

> **"Plaintiffs invoke the appellate jurisdiction of this court pursuant to La. Const. Art. V, § 5 (D), on ground that the district court declared LA. R.S. 13:1301, et seq., unconstitutional.**

Our independent review of the record reveals that the trial court's judgment never rendered the statute unconstitutional. While the trial court's judgment indicates it "conditionally" found the statutes unconstitutional, the judgment goes on to state that this finding is dependent "on the specific facts of this case, which will be revealed at trial." The judgment further states "the merits of the case and/or evidence presented at trial will decide the issue of constitutionality of LA. R.S. 15:1301, et seq."

Therefore, although the trial court's judgment makes certain references to the constitutionality of LA. R.S. 13:1301, et seq., it is clear these statements are dicta, since the court has not yet reached the merits of the case before it.

Accordingly, the appeals from this judgment filed in this court are dismissed, and the case is remanded to the trial court for further proceedings.

KNOLL, J. not on panel; recused.

New Orleans, Louisiana, this 19th day of November, 1997.

FOR THE COURT:

Bennet: J. Johnson
Justice, Supreme Court
of Louisiana"

Thereafter, both Johnson and Keller requested an order to stay all proceedings due to the fact that Aymond claimed his 5th Amendment Right of self-incrimination, and this hampered the progress of their civil law suit. The

Honorable William J. Bennett granted the Motion to Stay and proceedings have been stayed since that time.

Petitioners, Johnson and Keller, filed criminal charges against Aymond for violation of said statute, the matter was brought and heard before the Avoyelles Parish Grand Jury and a *No* True Bill was returned against Aymond.

There is no allegation that Aymond illegally obtained the information. Nor is there an allegation by Mr. Johnson or Mr. Keller that the alleged information is false; or the contents of the information. Petitioners only allege apparently an unlawful interception by an un-named person or persons.

Since these allegations occurred, petitioner Johnson was removed by the Louisiana Supreme Court from Judge, Division "A", 12th Judicial District Court, in and for the Parish of Avoyelles, State of Louisiana. The Louisiana Supreme Court found, in written reasons assigned, that Johnson was unfit (for reasons other than the case at hand) to serve. Thus, at this particular time, Johnson is no longer a public official, nor does he hold any public office; but, at the time the alleged incident occurred, Mr. Johnson was a district judge for the State of Louisiana. Mr. Keller was, at the alleged time that these alleged facts occurred, a member of the Avoyelles Parish Police Jury (the governing body of the parish) and still holds this office today as a parish public official.

SUMMARY OF ARGUMENT

Under **SUMMARY OF ARGUMENT**, LA. R.S. 15:1301-1312, the Electronic Surveillance Act of the State of Louisiana should be held unconstitutional, in that, it is in violation of the First Amendment of the United States Constitution and additionally violates the constitutional protections against cruel and unusual punishment.

ARGUMENT

LA. R.S. 15:1301-1312, as it is amended by the 1995 Legislature, attempts to regulate cordless telephone communications. Users of cordless telephones and other wireless devices have **"no reasonable expectation of privacy in their use of such devices which depend upon public airways for transmission."** Such use, is analogous to talking in a room full of people or shouting aloud in one's front yard amongst the neighbors surrounding one's home.

The Louisiana Supreme Court in *State of Louisiana v. Amanda Neisler, et al.*, 666 So.2d 1064, decided on January 16, 1996, states the following, to-wit: (see rehearing March 16th, 1995, 655 So.2d 252).

> **"In addition:**
>
> **We also consider whether cordless telephone transmissions are 'oral communication' as defined and protected by Louisiana Electronic Surveillance Act,** (see LSA R.S. 15:1301, et seq.) **After considering the relevance State and Federal Authority Statutory Law, we adjudge that the cordless telephone transmission at issue in**

> **this case are not protected (oral communications) under the Electronic Surveillance Act.** ***We further conclude that since such transmissions offer no reasonable expectation of privacy, they are not protected by pertinent provisions of the Louisiana or the Federal Constitutions."***

See also *McKamey v. Roach*, 55 F.3d 1236, in which the United States Court of Appeals, 6th Circuit, decided on June 9th, 1995, that even though cordless phone communications represent oral communications within the meaning of the statute, a protection of the statutes were limited to communication in which there is an expectation of privacy, and cordless telephones are broadcast over radio waves to all who wish to overhear. See also *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967).

The pleading of Mr. Keller indicates confusion as to whether a cordless or a wire phone was allegedly used.

In discussing the *Federal Wiretap Act*, 18 U.S.C., Section 2516(2), the Louisiana Court held:

> **"Thus, although in this case we will deal primarily with Louisiana statutes, we remain mindful of the fact that federal law is ultimately controlling in this area and that our construction of Louisiana's Electronic Surveillance Act should reflect an awareness of the purpose underlying the comprehensive federal scheme of which it is a part."**

In *United States v. Smith*, 978 F.2d 171 (5th Cir. 1992), the court took notice of the fact that congress apparently did not wish to criminalize the interception of radio

transmissions which were easily picked up by AM scanners, other cordless handsets or any number of ubiquitous and mundane radio receivers commonly found in the ordinary American household which are capable of intercepting such transmissions. Yet, the Louisiana statute does make illegal the use of electronic devices commonly used and found in American households on a daily basis. Certainly, the Louisiana Legislature did not intentionally intend to protect public officials allegedly engaging in illegal activity through use of the public airwaves or wire transmissions to further such activity.

In *Smith* the court stated that:

> **"The conversations which took place were not protected under Art. 1 Section 5 of the Louisiana Constitution, nor were they protected under the 4th and 14th Amendments of the United States Constitution. Nor was the conversation protected under the act because there was 'no reasonable expectation of privacy.' "**

The Louisiana Statute, in fact, seems to do otherwise. The Louisiana Act (LA R.S. 15:1301, et seq.) would seem to protect public officials using public airwaves to violate public laws on issues of public concern. This act would impede this information being published by news sources, thus, would be kept secret. This would be true even if the disclosure was truthful, lawfully obtained (by the disclosure), and a matter of public concern. This act violates free speech.

The Louisiana act appears to be in conflict with 18 U.S.C., Section 2702(5)

Disclosure of Contents:

"As may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service; or

(B) Appear to pertain to the commission of a crime."

The above section of 18 U.S.C. Section 2702 sets forth authorization for disclosure and use of intercepted wire, oral, or electronic communications.

Thus, the federal statute allows the disclosure of contents, in fact, when there is an inference or an appearance that a crime is in commission; as an exception to the general statute. An ordinary citizen, much less, a local newspaper would appear to have an obligation to disclose and/or to publish information involving the commission of a felony, especially on issues of public concern and possibly involving public officials. If not, would such an individual who has knowledge of such information, be guilty of **"misprision of a felony"?**

Carpenter v. State, 36 S.W. 900, 62 Ark. 286, held that, to-wit:

"It is the duty of everyone, seeing any felony attempted, by force to prevent it; and one who fails to discharge such duty is guilty of a misdemeanor called "misprision of a felony."

Under LA. R.S. 15:1303(B), the Louisiana Statute provides for not more than a $10,000.00 fine and imprisoned for not less than 2 years, no more than 10 years, without the benefit of probation, parole, or suspension of sentence. To the contrary, 18 U.S.C. Section 2510, et seq.

provides that the federal government would be entitled to the appropriate injunctive relief and poses a civil fine of not less than $500 for each violation of such injunction. The statute also provides that the defendant shall be fined under this title or imprisoned for not more than one year or both. The Louisiana statute imposes a mandatory 2 to 10 years sentence for a first offender for violation of the statute, and as such, is overly harsh, cruel, and substantially unusual punishment.

The 8th Amendment (applied to state's via the 14th Amendment) to the United States Constitution forbids cruel and unusual punishment which includes excessive punishment. *Robertson v. California*, 370 U.S. 660, 82 S.Ct. 1417, Art. 1, s.20 of the Louisiana Constitution expressly forbids cruel, excessive or unusual punishment.

State v. Beavers, 382 So.2d 943, a Louisiana case which held that, to-wit:

> **"Punishment is excessive 'if it is grossly out of proportion to the severity of the crime of if it is nothing more than the purposeless and needless imposition of pain and suffering."**

Under LA R.S. 15:1304(A), states, to-wit:

> **"It shall be unlawful for any person willfully to manufacture, assemble, possess, or sell any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications."**

Thus, it would appear, the Louisiana statute holds liable, as a violator of this act, any housewife, child, or

other individual who merely owns or possesses a radio scanner, a television set, or any electronic or other device which is capable of intercepting the airwaves.

Free Speech or the First Amendment protections are violated by the Louisiana statute. *Hustler Magazine and Larry C. Flynt v. Jerry Falwell,* (1987) Decision (1988), 485 U.S. 46, 108 S.Ct. 876.

> **"The Supreme Court, in interpreting the First Amendment, recognized the fundamental importance of the free flow of ideas and opinions on matters of public concerning interest. The freedom to speak one's mind is not only an aspect of individual liberty and thus a good unto itself, but also is essential to the common quest for truth and the validity of society as a whole."**

See also *New York Times Company v. L. B. Sullivan,* 376 U.S. 254, 84 S.Ct. 721.

> **"Criticism of public officials will not always be reasonable or moderate; public figures as well as public officials will be subject to vehement, caustic, and sometimes unpleasant sharp attacks. A candidate who vaunts his spotless records sterling integrity cannot convincingly cry 'foul' when an opponent or an industrious reporter attempts to demonstrate to the contrary."** See *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 91 S.Ct. 621.

See also *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209.

See also *Cox Broadcasting Corp. v. Cohn,* (1974) 420 U.S. 469, 95 S.Ct. 1029, concerning matters which are of a public record.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, stands for the proposition that the defense of truth is constitutionally required where the subject of the publication is a public official or public figure. The defamed public official or public figure must prove not only that the publication is false, but that it was knowingly so, or was circulated with reckless regard for its truth or falsity.

CONCLUSION

LA R.S. 15:1301-1312 is unconstitutional, in that, it violates the First Amendment of the United States Constitution and suppresses Free Speech, and also, contains mandatory imprisonment of 2 to 10 years at hard labor for each count of violation, which is in itself, cruel and unusual punishment. Judge Hand in the case of *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, stated that, to-wit:

> **"The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many, this is and always will be, folly; but we have staked upon it our all."** See also, *United States v. Associated Press,* 52 F.Supp. 362.

Whitney v. California, 274 U.S. 357, 47 S.Ct. 641.

It is worth repeating what the court held:

> **"Believing in the power of reason as applied through public discussion, they eschewed**

silence coerced by law – the argument of force in its worse form."

The Louisiana statute violates both our First and our Fourteenth Amendment rights. If public officials use public airwaves to discuss the public's business, laws should not be passed to keep secret the voices of such elected officials. Such laws and statutes violate Freedom of Speech and our First Amendment and Fourteenth Amendment protections. The U.S. Supreme Court has adopted the strict standard in similar cases. *Cox v. Cohn,* 420 U.S. 469. The government has only allowed such restricted speech when *"a state can show an interest of the highest order."*

Justice Goldberg in *Whitney v. California* stated that:

"I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions or its officials. For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it. An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."

This act would seem to protect any public officials using public airwaves while discussing possible wrongful

activities on matters of public concern even if the information was lawfully obtained and truthful. Certainly, this statute cannot meet the strict standard test nor can the state of Louisiana show *"an interest of the highest order."*

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, LA R.S. 15:1301, et seq. statute should be held in violation of First Amendment rights of Free Speech and containing statutorial penalties which are cruel and unusual.

Respectfully submitted,

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On Petition For A Writ Of Certiorari To The Third Circuit Court Of Appeal Of The State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether this Honorable Court should grant a Petition For Writ of Certiorari prior to exhaustion of State remedies and prior to adjudication in any inferior Federal tribunals.

II.

Whether Louisiana's Electronic Surveillance Law, La. R.S. 15:1301, et seq. violates any provisions of the United States Constitution.

PARTIES TO THE PROCEEDINGS

Michael J. Johnson and McKinley Keller are plaintiffs in the State Court proceedings entitled: Civil Suit No. 96-3590-B; Michael J. Johnson vs. Carol Aymond, Jr., et al. and Civil Suit No. 96-3663-B; McKinley Keller vs. Carol Aymond, Jr. et al. Both parties appear as respondents in these Certiorari proceedings;

Central Newspapers, Inc. is a defendant in the two above encaptioned proceedings and is the petitioner in these Certiorari proceedings;

Avoyelles Publishing Company, its editor and/or publisher, Randy Decuir, and John Doe, aka "Alphonse A. Alphonse" a nameless editorializer for the Avoyelles Publishing Company, are defendants in the two above encaptioned proceedings;

Carol Aymond, Jr. is a defendant in the above encaptioned proceedings and is the person who illegally disseminated taped telephone conversations of plaintiffs, Michael J. Johnson and McKinley Keller.

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STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

During the year 1996, respondent, Michael J. Johnson, was seeking re-election to the post of Louisiana State District Judge, a position he was first elected to in 1990. His opponent in the October election was defendant, Carol Aymond, Jr. On November 6, 1996, defendant, Aymond, convened a press conference in his office in Bunkie, Louisiana and invited members of the press as well as several citizens. He proceeded to play tape recordings of telephone conversations held between Michael J. Johnson and McKinley Keller while in the privacy of their homes. Neither person gave consent to anyone to tape said conversations. After the playing of the tapes, Aymond passed out what purported to be transcripts of the tapes. A casual look at these "transcripts" reveals revisions and editing by Aymond, or someone acting on his behalf, to say what he obviously wanted them to say. The defendant, Avoyelles Publishing Company, and/or its editor and/or reporter had a feeling these tapes were illegal before ever attending the news conference and later admitted as much to Johnson. After the November 6, 1996 news conference, both defendant newspapers ran headline news stories revealing not only that there had been a news conference and that allegations had been made, but also, revealing the **contents** of these illegally taped conversations. The defendant newspapers made no effort at all to see if the transcripts matched the tapes nor did they attempt to fashion any news stories not using said contents.

One week later, on November 13, 1996, Aymond conducted another news conference and, again, played illegal tapes and distributed altered transcripts. At this news conference, Aymond played tapes and distributed edited transcripts of conversations between Keller and District Attorney Eddie Knoll and Louisiana State Representative Charlie Dewitt. These tapes did not involve Johnson at all. In the intervening week, both defendant newspapers had sought out the opinion of the District Attorneys' Office in their respective parishes (counties). The District Attorneys of both Parishes were united in their opinion that these tapes and Aymond's activities were illegal. Defendant, Avoyelles Publishing Company heeded this advice and only printed a news story about the news conference and the allegations made, but did not use the contents of the taped conversations. Defendants, Central Newspapers Inc., threw care to the wind and again printed the contents of these taped conversations knowing full well that Aymond's activities were illegal. None of the defendants have ever contended that Aymond's activities were legal or that they even thought they were. Suit was filed against all defendants. No charges were ever filed against Johnson and Keller by any authority, no indictment ever returned against either person, no criminal trial ever conducted and no conviction ever had from any information revealed by these illegally intercepted and recorded telephone conversations. There were no disciplinary proceedings instituted against Johnson because of the contents of these tapes or the allegations made by Aymond. Although Johnson was removed from his position as District Judge, said removal was not based on any alleged misconduct relating to these taped

conversations but instead, arose out of Johnson's owning pay telephones in Avoyelles Parish Jails while serving as District Judge. Petitioner's allusion to Johnson's removal on page 3 of the Petition For Writ of Certiorari is misleading and is an attempt to equate these tapes with "public interest" and "judicial misconduct."

B. LEGAL BACKGROUND

After suit was filed against all defendants, defendant, Aymond, asserted his 5th Amendment Right against self-incrimination and, at the request of Johnson and Keller, all proceedings as to him were stayed. Defendants, Central Newspapers, Inc., filed an Exception of No Cause of Action, which was sustained by the Trial Judge. Plaintiff's, Johnson and Keller, applied for Supervisory Writs to the Honorable Third Circuit Court of Appeal and the Trial Judge's decision was reversed. Likewise, defendants, Avoyelles Publishing Company, Randy Decuir and John Doe, aka "Alphonse A. Alphonse", filed a Motion For Summary Judgment, which the Trial Judge sustained. Again, plaintiffs applied for supervisory writs to the Honorable Third Circuit Court of Appeal and again the Trial Judge was reversed. This time, defendants, Avoyelles Publishing, Decuir, John Doe and Central Newspapers, Inc., sought supervisory writs in the Louisiana Supreme Court. Their applications were denied. This Petition For Writ Of Certiorari then ensued.

ISSUES PRESENTED

1) **Should this Honorable Court grant this Petition For Writ of Certiorari prior to the exhaustion of state remedies and prior to adjudication in any inferior Federal tribunals?**

ARGUMENT

It has long been the established jurisprudence of this Honorable Court, and its subordinate inferior Courts throughout the Land, that the Federal Courts will not interfere in the administration of justice, with rare exceptions such as claims raising Civil Rights violations, throughout the various states unless and until all remedies in state courts have been exhausted. *O'Sullivan vs. Boerckel*, 119 S.Ct. 1728 (1999); *Castille vs. Peoples*, 109 S.Ct. 106 (1989). Petitioners in this matter seek to rush their cause from infancy to old age in one giant legal step.

Thus far, the Third Circuit Court of Appeal for the State of Louisiana, the tribunal which is the first in the hierarchy of appeals over state district courts in the geographical area in which the parties are situated, has, on two occasions, ruled in favor of Johnson and Keller's privacy rights. The Third Circuit, in its December 23, 1998 opinion, carefully and meticulously examined the issues of *Freedom of the Press vs. Rights To Privacy*, coming down squarely on the side of Johnson and Keller. The Louisiana Supreme Court, on application by the defendant newspapers, refused to hear the matter by a 4-3 vote. As much as plaintiffs would like to believe that the majority of that Court felt Johnson and Keller's rights to privacy outweighed the newspapers right to sell papers at any cost

to citizens, we, in fact, have not, at this point received a clear ruling from this State's highest Court on the Constitutionality of Louisiana's Electronic Surveillance Law. We only know that the Louisiana Supreme Court decided not to exercise its discretionary right to hear the writ application ***at the time it was presented***. This, in no manner, details what our State Supreme Court will decide when the issue is squarely before it upon appeal after trial on the merits.

Likewise, although defendant newspapers have done a great deal of posturing in their own publications about seeking relief in federal court, none of the defendants have filed any proceedings in the local Federal District Courts to declare Louisiana's statutes unconstitutional.

It is respectfully submitted that, until this matter has been allowed to proceed to trial, and all facts developed, and until such time as Louisiana's Supreme Court and/or a Federal District Court, has issued a ruling on the constitutionality of Louisiana's Electronic Surveillance Act, this Honorable Court should refuse to entertain this Petition For Writ Of Certiorari.

2) Is Louisiana's Electronic Surveillance Law, La. R.S. 15:1301, et seq. Unconstitutional?

The defendant newspapers try to couch the legal question to this Honorable Court in innocent terms of whether the First Amendment protects newspapers when they accurately report information of "public concern" from a source who has illegally acquired this information. The "public concern" they contend, is judicial misconduct. The defendants misconstrue the question.

The question presented is whether the individual states of this nation can, without doing harm to the U.S. Constitution, draw a narrow law that restricts the use of the **contents** of illegally obtained information in order to protect the privacy rights of the citizens of their state. No one, and no law, is trying to muzzle a free press in the reporting of valid news stories. The newspapers could well have reported the existence of the news conferences, the existence of tapes and the allegations made by Aymond. They were, however, not content to do so, opting for the more sensational reporting of the contents of illegally obtained tapes which had been edited by a spiteful and embittered loser of a political race. The justification that judicial corruption is of grave public concern, thereby necessitating exposure by America's press, will not bear close scrutiny either.

Johnson, a District Judge, was never disciplined as a result of these illegal tapes. No authority, either state or federal, ever instituted criminal, civil or administrative proceedings against him because there was nothing to institute proceedings for. Moreover, the second tape did not involve Johnson, and, therefore, could not involve any contention of judicial misconduct. The defendant newspapers gloss over this fact just as they attempt to relate Johnson's removal from office to the tapes, a fact not even remotely related to reality.

The undersigned could not begin to cite more authorities more persuasively on these issues than did the Honorable Third Circuit Court of Appeal of the State of Louisiana in its December 23, 1998 ruling involving these matters. (Cited at 722 So.2d 1224 (La. 1998)). Respondents, Johnson and Keller cite said opinion, and all

authorities cited therein, as authority for their position before this Honorable Court.

Quoting from a pertinent portion of the above mentioned ruling, the reason the newspapers should be held liable is: "Moreover, in the absence of an indictment and a pending criminal trial, individuals whose wiretapped conversations are disclosed have no judicial forum in which they may potentially vindicate themselves or their conduct. . . . " Such is the case at bar. Once tarred and feathered by the media, quoting from inaccurate transcripts of illegal wiretaps, respondents Johnson and Keller can only languish in their communities that have been inundated with newspaper type. There is no overcoming the harm, other than redress through our courts.

CONCLUSION

This is not a case of saving the nation's news media from censorship. This is a case of protecting citizens in the privacy of their homes from eavesdroppers and profit minded media. As stated earlier, the newspapers could have printed a legitimate news story without printing the contents of these tapes. The contents are all that Louisiana's law seeks to keep confidential. The newspapers, indeed, seek to establish their status as the Fourth Estate. Although they see no problem with our law telling judges that these contents cannot be used in any proceedings of whatever nature, they set themselves up as higher authorities and claim that, while the law may control what Courts hear, it cannot control what the media prints. No right contained in the U.S. Constitution is absolute

and without exception. The right to privacy is not without exception, but neither should be the right to freedom of the press. At some juncture, these powerful syndicates must be held at bay for the protection of the citizenry of this nation. To allow the newspapers to decide what is of "great public concern", on their own, and to allow them to vilify and scandalize people who, in the privacy of their homes spoke on telephones, will lead to chaos beyond imagination. Their power to spread information, accurate or otherwise, is immense, for their newsprint reaches far beyond the boundaries of normal gossip circles. Once it has been loosed, an individual cannot, without the help of the courts and public judicial procedure, right the wrongs that have been visited upon him. Louisiana's Electronic Surveillance law is narrowly drawn to effectively prevent his harm, and it is respectively submitted that this velvet muzzle should not be removed from what, in some instances, can be an irresponsible and mean press, motivated, not by a sense of public duty, but by a sense of desire for corporate and/or personal profit.

Respectfully submitted,

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APPENDIX

NO. 98-844

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

McKINLEY KELLER DEC 23 1998

Plaintiff-Appellant

VERSUS

CAROL AYMOND, JR.,
ET AL.

Defendants-Appellees

CONSOLIDATED WITH

NO. 98-843

MICHAEL J. JOHNSON

Plaintiff-Appellant

VERSUS

CAROL AYMOND, JR.,
ET AL.

Defendants-Appellees

On appeal from the Twelfth Judicial District Court [Nos. 97-3663-B and 96-3590-B], Parish of Avoyelles, State of Louisiana; the Honorable William Bennett, District Judge, presiding.

BEFORE: THIBODEAUX, DECUIR, and GREMILLION, Judges.

THIBODEAUX, Judge,

The plaintiffs in these consolidated cases, Michael J. Johnson and McKinley Keller, sued, among others, the Avoyelles Publishing Company and its publisher, Randy DeCuir, for publishing the contents of their private telephone conversations allegedly intercepted in violation of the Louisiana Electronic Surveillance Act, La.R.S. 15:1301 et seq. The trial court, finding a lack of criminal willfulness on the part of the newspaper, granted summary judgment to the defendants, and the plaintiffs filed this appeal. Following our *de novo* review of the record, we reverse the summary judgment granted below due to issues of fact and law.

I.

ISSUES

We must consider:

1) whether the trial court erred in granting summary judgment to DeCuir and Avoyelles Publishing Company due to issues of fact or law regarding the defendants' violation of the Electronic Surveillance Act, R.S. 15:1301 et sequitur;

2) whether a criminal violation of La.R.S. 15:1303 is a prerequisite to a civil action under R.S. 15:1312; and,

3) whether the Electronic Surveillance Act, La.R.S. 15:1301 et seq. violates the constitutional rights of the defendant newspapers.

II.

FACTS

These consolidated lawsuits arise in part from the alleged illegal interception and taping of various private telephone conversations between the plaintiffs, Michael J. Johnson and McKinley Keller, and others. Mr. Johnson and Mr. Keller sued the defendant, Carol Aymond, Jr., alleging that he illegally intercepted and taped their conversations, that is, without the consent of any party involved, in violation of the Electronic Surveillance Act (hereinafter "the Act") at La.R.S. 15:1301, et sequitur. Mr. Aymond then allegedly called a press conference, played the tapes, and distributed copies of the transcripts of the taped conversations to those in attendance, including various newspapers and their associated reporters. The trial court has previously held that Mr. Aymond's actions constituted a "disclosure" under the Act.

The newspapers then allegedly printed excerpts from the contents of the intercepted communications of Mr. Johnson and Mr. Keller. Accordingly, the plaintiffs sued the newspapers, including the defendants herein, the Avoyelles Publishing Company and the publisher and editor/correspondent of the *Avoyelles Journal* (hereafter collectively referred to as "Avoyelles Publishing"), for publishing the contents of illegally intercepted communications, which is specifically prohibited under the Act at La.R.S. 15:1307. The plaintiffs also allege the newspaper's violation of the Act through "disclosure" and "use" of the intercepted information.

The district court previously granted an Exception of No Cause of Action filed by another defendant, Central

Newspapers, which we reversed. *Johnson v. Aymond*, 97-1466 (La.App. 3 Cir. 4/1/98); 709 So.2d 1072, *writ denied*, 98-1181 (La. 6/19/98); ___ So.2d ___. The district court then granted a partial summary judgment in favor of Avoyelles Publishing, which we now reverse. The record does not contain a transcript of the summary judgment hearing or written reasons by the trail court explaining its granting of summary judgment in favor of Avoyelles Publishing. However, the record indicates that the trail judge followed the same reasoning articulated in its prior judgment in favor of Central Newspapers, and those written reasons are included in the record. Accordingly, it is not necessary in this case to read the hearing transcript, and we find sufficient information in the record to aid us in our decision in this case.

III.

LAW AND DISCUSSION

Standard of Review

Appellate courts review summary judgments *de novo*, under the same criteria that govern the district court's consideration of the appropriateness of summary judgment. *See Schroeder v. Board of Supervisors*, 591 So.2d 342 (La.1991); *Benoit v. Roche*, 94-715 (La.App. 3 Cir. 6/14/95); 657 So.2d 574. A motion for summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La.Code Civ.P. art. 966.

Assignments of Error

Michael Johnson and McKinley Keller contend that the trail court erred in granting partial summary judgment to the defendants, Randy DeCuir and the Avoyelles Publishing Company, due to the existence of material issues of fact and as a matter of law. The plaintiffs further ask whether the court erred in ruling that there must be criminal willfulness by the defendant in violating R.S. 15: 1303 before a civil remedy can be sought under R.S. 15:1312, and whether the court erred in holding that the Act was a violation of the defendant newspaper's First Amendment (free speech/free press) rights.

Constitutionality of La.R.S. 15:1301 et seq.
Privacy Versus Access

As to the First Amendment violations in reversing the Exception of No Cause of Action of Central Newspapers, in *Johnson v. Aymond*, 709 So.2d 1072, we held that the lower court erred in considering the constitutionality of these statutes because the issue was not properly pled and because the Attorney General was not notified of the constitutionality proceeding pursuant to La.R.S. 13:4448.

In declining its jurisdiction to hear the issue, the Louisiana Supreme Court held that the trial court never specifically rendered the Electronic Surveillance Act unconstitutional but stated that "the merits of the case and/or evidence presented at trial will decide the issue of constitutionality of La.R.S. 15:1301, et seq." *See Keller v. Aymond*, 97-2203, 2204 (La. 11/19/97); 702 So.2d 1387. Notwithstanding, the Louisiana Supreme Court subsequently declined jurisdiction on the constitutionality

issue again and transferred the appeal to this court in *Keller v. Aymond*, 98-0552, 98-0553 (La. 4/23/98); 717 So.2d 1151. Moreover, there is evidence in this record that an "exception based upon unconstitutionality" was filed by the defendant, Aymond, in a prior related proceeding. While the lower court did not declare the entire statute unconstitutional so as to require the Attorney General's involvement, the trial court has twice held that once the illegally intercepted conversation was disclosed by Aymond, any restrictions upon the newspaper from reporting this disclosure would be a violation of the constitutional right of freedom of the press. Accordingly, we will now decide the constitutional issue which has been raised again by both plaintiffs and defendants in their briefs to this court.

The Electronic Surveillance Act, La.R.S. 15:1301 et sequitur, provides generally that it is unlawful to intercept, disclose, or use wire or oral communications unless authorized to do so under color of law and with the consent of at least one of the parties to the communication. Title 15 contains three sections which are pertinent to this case: section 1303, which provides specific remedies in the form of criminal fines and imprisonment for the "willful" interception, disclosure and use of the communication; section 1307, which does not specify a remedy, but prohibits publication and court use of the information; and section 1312, which provides specific civil remedies in the form of monetary damages, including attorney fees and punitive damages, against any person who intercepts, discloses or uses such information.

No Louisiana jurisprudence has interpreted the substance of the Louisiana Act. However, Louisiana's Electronic Surveillance Act was fashioned after its federal counterpart. 18 U.S.C. 2510 et sequitur, known as Title III's Onmibus Crime Control and Safe Streets Act, and federal law is instructive in the areas where the provisional language coincides.

In the present case, two important constitutional rights conflict. The First Amendment to the United States Constitution and Article 1, Section 7 of the Louisiana Constitution protect the public's right of access to information of legitimate public interest and to a free press. The Fourth Amendment to the United States Constitution and Article I, Section 5 of the Louisiana Constitution protect an individual's right to conversational privacy. *See Katz v. United States*, 389 U.S. 347 (1967). However, neither right is absolute; each is qualified. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (first amendment); *Berger v. New York*, 388 U.S. 41 (1967) (fourth amendment). What is required in this case is a careful balancing of the public's interest in access and of freedom of the press against the individual's privacy interests.

We find the case of *Certain Interested Individuals, John Does I-V, Who Are Employees of McDonnell Douglas Corporation v. The Pulitzer Publishing Company*, 895 F.2d 460 (U.S. 8th Cir. (Mo.) 1990), *cert. denied*, 498 U.S. 880 (1990), most compelling and instructive in deciding this constitutionality issue of first instance in Louisiana. In *Pulitzer Publishing*, the newspaper sought access to FBI affidavits which were attached to applications for search warrants issued in a federal investigation. The FBI's affidavit was based in large part upon telephone conversations that

had been intercepted pursuant to court-ordered wiretaps. The individuals under investigation argued that their privacy rights outweighed the public's interest in access to the information and that Title III, 18 U.S. 2510 et seq. protected the materials from disclosure because the materials contain intercepted communications.

The federal statute authorizes wiretaps by law enforcement officers and 18 U.S.C. 2517(2) authorizes the limited use of the contents in search warrants in order to establish probable cause to search. Other sections of the federal statute provide that properly obtained wiretap information must be sealed but can subsequently be disclosed through testimony under oath. In finding against the newspaper, the court made it clear that the statute authorized disclosure only between agents in the performance of their duties and **while giving testimony**. The court in *Pulitzer Publishing* upheld the privacy rights of the intercepted individuals, and its reasoning, as follows, is particularly pertinent under the facts of this case:

> Nonetheless, disclosure to a limited audience of "professionally interested strangers" in the context of their official duties is not the equivalent to disclosure to the public. Title III does not allow public disclosure of all lawfully obtained wiretap evidence just because a few officers are privy to its contents; if this were construed to do so, much of the statute would be superfluous. . . . We do not agree that once wiretap information is used in search warrant affidavits, it is no longer subject to Title III's restrictions upon its use and disclosure. We do not think that Title III's restrictions can be so easily avoided. The use and disclosure of wiretap

> information in search warrant affidavits pursuant to 18 U.S.C. 2517(2) cannot transform the wiretap information into non-wiretap information unprotected by Title III. Acceptance of this argument would create a very large loophole in Title III.

Pulitzer Publishing, 895 F.2d at 465.

Similarly, in the present case, once the plaintiffs' communications were intercepted and used by Aymond, that initial disclosure did not transform the intercepted communications into non-intercepted communications unprotected by Louisiana's Title 15.

Moreover, the allegedly illegal nature of the interceptions in this case should entitle the plaintiffs to even greater protection than those afforded the investigated individuals in *Pulitzer Publishing*.

In balancing the public's and the newspaper's right of access against the individual's right of conversational privacy, the *Pulitzer Publishing* court stated that the absence of an indictment against the individuals was critical because where no indictments had issued against persons allegedly involved in criminal activity, there was a clear suggestion that the Government could not prove the allegations. The court stated that "The court of public opinion is not the place to seek to prove them." *Id.* at 466. The court further articulated:

> Moreover, in the absence of an indictment and a pending criminal trial, individuals whose wiretapped conversations are disclosed have no judicial forum in which they may potentially vindicate themselves or their conduct. Without an indictment, there can be no trial and, from

> their perspective, no acquittal. Thus, [w]here privacy interests in wiretapped conversations are asserted, the court must consider how disclosure of the information would affect the persons identified and society's interest in disclosure. A number of factors enter into this analysis, including the extent of public knowledge of the material, the accusatorial nature of the material, and the need for public scrutiny of the government operations disclosed in the material. . . .

Id. at 467.

In the present case, the record contains no evidence that government operations were involved or that the wiretap was legally obtained by law enforcement officers during an investigation. The allegation is that the interceptions were *illegally* obtained by private citizens. If covert activity was suspected, a legal wiretap should have been ordered, and even that would have been afforded protection. Hence, there is no legitimate public interest to be served by the newspaper's disclosure of the private conversations of the plaintiffs in this case. The plaintiffs had an expectation of privacy in their personal conversations that is clearly protected by the Fourth Amendment to the United States Constitution and by Article 1, Section 5 of our state constitution. Therefore, there is no question that the Electronic Surveillance Act, La.R.S. 15:1301 et seq, which merely creates a method for enforcing the Fourth Amendment's and Article 1, Section 5's protection of conversational privacy, does not unconstitutionally impinge on any freedom of the press protections.

Neither the public nor the press has a right of access to private conversations between private individuals initiated in the privacy of their respective homes. This is particularly true when intercepted individuals have not been indicted for a crime and yet stand to have their reputations and careers seriously damaged by public opinion. We find that the protections against public disclosure of allegedly *illegal* interceptions in La.R.S. 15:1301 et seq are not only constitutional but are even more important that the protections of legally obtained wiretaps in the federal statute.

Our courts have made it clear that the media does not have unfettered rights of access or rights to publicize the contents of any audio and visual event it so desires without the consent of the parties involved just because the First Amendment and Article 1, Section 7 protect freedom of speech and freedom of the press. In *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562 (1977), the United States Supreme Court unequivocally articulated that the First and Fourteenth Amendments of the Constitution did not immunize a television broadcasting company when it broadcasted a performer's entire act without his consent. In balancing rights, the press is subject to the same restrictions which our law imposes on the general public. Indeed, the press "is responsible for abuse of [the] freedom" given to it. La.Const., art. 1. § 7.

In *California First Amendment Coalition v. Calderon*, 97-15493 (U.S. 9th Cir. (Cal.) 7/23/98); 150 F.3d 976, a coalition of press and broadcast journalists challenged the exclusion of witnesses from certain phases of lethal injection executions. There, the prison's Procedure 770 was under attack. It prohibited the public viewing of officials

escorting an inmate to the chamber, strapping him to the gurney, and inserting the IV tubes, but allowed observation beginning at the time the lethal drug was running through the IV. Procedure 770 minimized the exposure of the members of the execution team to the media or other witnesses out of concern for staff safety and institutional security. In upholding prison Procedure 770, the court articulated that the First Amendment does not protect the right of the press to gather news not available to the public.

The court's reasoning in *Calderon* is particularly germane to this case. In *Calderon*, the court stated that the right of the press to gather news and information is protected by the First Amendment in order to prevent freedom of the press from being eviscerated. However, the court made it clear that, "[a]lthough substantial, the protection is not without limits. For example, the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Calderon*, 150 F.3d at 981, *citing Branzburg v. Hayes*, 408 U.S. 665 (1972). The *Calderon* court then cited other Supreme Court cases limiting the press in its access to inmates. In all cases, the courts found that because the challenged policies did not deny the press access to sources of information available to members of the general public, those policies did not violate the First Amendment. The court expressed its agreement that executions are matters of great public importance, and that more information leads to a better informed public. It further articulated its acknowledgement that the role of the media is important and that, acting as the eyes and ears of the public, it can be a powerful and constructive

force, contributing to remedial action in the conduct of public business.

However, the court poignantly observed that "the First Amendment does not protect the right of the press to gather news not available to the public" and that holding is "not predicated upon the importance or degree of interest in the matter reported." Succinctly stated, the press has no First Amendment right of access greater than that of the public. *Id.* at 982. Similarly, in the present cases, the public at large has no right of access to private telephone conversations between individual citizens, and the Louisiana Electronic Surveillance Act further prohibits such access through interception, use and disclosure. Accordingly, these prohibitions are constitutional and are extended to the press. The press cannot escape the prohibitions of the Louisiana Electronic Surveillance Act under the guise of constitutional protection. We find that La.R.S. 15:1301 et seq should be stringently enforced and construed against the violator of any of its sections pursuant to a literal interpretation of the statute as set forth more fully below.

Criminality Is Not Required Under All Sections of The Louisiana Act

The trial court determined that, because an Assistant Attorney General stated in a prior proceeding that he "felt there was no way" to find criminal behavior on the part of the newspapers in printing the contents of the audiotapes, there could also be no civil remedy against Avoyelles Publishing. We disagree. We find that the statutes address criminal *and* civil violators and provide for

criminal *and* civil penalties. We further find that the illegal interceptor is a criminal violator *and* is also subject to civil penalties, while the secondary user of the information may be liable criminally and civilly *or* only civilly depending upon the circumstances surrounding his use of the information. Accordingly, we find that the trial court erred in holding that criminal willfulness must exist on the part of the defendant newspaper before the plaintiffs can claim a civil remedy under La.R.S. 15:1312. Hence, the newspaper can be held civilly liable for publishing the contents of the taped conversation, even if it was not charged in a criminal proceeding or even if the elements of criminal willfulness are lacking.

As stated Louisiana's Electronic Surveillance Act was fashioned after its federal counterpart, 18 U.S.C. 2510 et sequitur. However, it is important to note that Louisiana did not adopt many of the provisions of the federal act, and the language varies significantly between the two acts, as do the penalties mandated by each. Therefore, while the defendant newspaper seeks to analogize federal cases interpreting the federal act, we must compare the pertinent language in the applicable provisions before taking instruction from federal cases.

La.R.S. 15:1303 And Federal Statute 18 U.S.C. 2511

Generally, La.R.S. 15:1303 provides that it is unlawful to willfully intercept a wire or oral communication without color of law and the consent of one of the parties to the communication: and it is illegal to willfully disclose or use the contents of the communication if there is reason to know that it was illegally obtained. Section 1303

does provide for criminal penalties up to $10,000 and imprisonment between two and ten years at hard labor. More specifically, section 1303 provides in pertinent part:

> Section 1303. Interception and disclosure of wire, electronic, or oral communications:
>
> A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:
>
> (1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;
>
> (2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic, mechanical, or other device to intercept any oral communication . . .
>
> (3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of ***this Subsection***; or
>
> (4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of ***this Subsection***.
>
> B. Any person who violates the provisions of ***this Section*** shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard

> labor, without benefit of probation, parole, or suspension of sentence. (Emphasis added)

Therefore, section 1303 of Louisiana's Electronic Surveillance Act does provide for criminal penalties and imprisonment, but only for violations under "***this Section***," that is section 1303. The District Attorney's Office has not filed criminal charges in this matter. It is clear from the record that the trial court based its dismissals of the civil suits against Central Newspapers, Inc., and of Avoyelles Publishing on its finding of a lack of criminal intent. More specifically, in the trial court's "Reasons for Ruling" wherein it granted the Exception of No Cause of Action filed by Central Newspapers, the court referenced a prior proceeding, "In Re: A Matter Under Investigation." There, the trial court took cognizance of statements made by a Louisiana Assistant Attorney General indicating that he "felt there was no way" that the State of Louisiana could establish criminal intent on the part of any of the newspapers.

Again, in its Judgment denying the State's Motion to Compel and the Bunkie newspaper's Motion to Quash, the trial court articulated that the "*publication* of information disclosed at the press conferences" was "not a disclosure as described in Louisiana Revised Statute 15:1303(A)(3)." Hence, it is clear from the court's two prior judgments that it found no criminal disclosure by the newspapers, and used that as a basis for dismissing civil liability claims against them. However, the trial court erred in interpreting the law when it found that *all* sections of the Act required criminal intent.

Since no Louisiana jurisprudence interprets the Louisiana Act, the defendants cite only federal cases interpreting 18 U.S.C. 2510 et seq. More particularly, the federal counterpart of La.R.S. 15:1303 above is 18 U.S.C. 2511, which prohibits the "intentional" interception, disclosure and use of private conversations except by law enforcement officers pursuant to court orders.[1]

The federal statute, 18 U.S.C. 2511, provides for civil fines of $500 in some instances *or* imprisonment of up to five years, or both; while the Louisiana statute provides for a fine up to $10,000 ***and*** imprisonment of not less than two years and up to ten years. Moreover, the federal statute provides for various levels of offenses, while the Louisiana statute does not. The Louisiana statute carries more stringent penalties and is broader, as more fully explained below. As stated, we find that the Louisiana statute, while it may follow some provisions of the federal statute, is not an adoption of the federal statute. Federal jurisprudence is not controlling but is instructive in certain limited circumstances.

In our previous decision, without determining specifically whether a criminal violation was required, we reversed the Exception of No Cause of Action granted to Central Newspapers, finding that the plaintiffs had stated a cause of action "under the literal language of the Electronic Surveillance Act." *Johnson v. Aymond*, 709 So.2d at

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[1] The federal statute, section 2511, uses the word "intentionally" rather than "willfully," as seen in Louisiana section 1303, due to the United States Congressional amendment to 2511 in 1986, substituting the word "intentionally" wherever the word "willfuly" had been used.

1075. At the present time, in reversing the summary judgment granted to Avoyelles Publishing, we specifically hold for the following reasons that criminal intent is not a requirement under all sections of the Louisiana Electronic Surveillance Act and that, as a matter of law, the defendants may be held liable under the Act. More specifically, neither La.R.S. 15:1312 nor La.R.S. 15:1307 requires criminal intent or provides for criminal penalties or imprisonment. Further, section 1307 specifies that "broadcasting" and "publishing" the contents of intercepted communications is prohibited.

La.R.S. 15:1307 Prohibits Use for Broadcasting and Publishing; Federal Statute, 18 U.S.C. 2515 Does Not

Louisiana Revised Statute 15:1307 provides that the contents of illegally intercepted communications cannot be used as evidence in a court or legislative proceeding and cannot be broadcasted or published. This section, however, does not provide for a specific remedy when the section is violated. Section 1307 provides in pertinent part:

> 1307. Prohibition of use as evidence or intercepted wire or oral communications
>
> A. Whenever any wire or oral communication has been intercepted, **no part of the contents of such communication** and no evidence derived therefrom **may be received in evidence** in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, **if the disclosure of that**

information would be in violation of this Chapter.

B. **No person may broadcast, publish,** disseminate, or otherwise distribute **any part of the content of an electronic communication intercepted in violation of the provisions of this Chapter** unless such dissemination or distribution is made to an investigator or law enforcement officer conducting an investigation into a violation of the provisions of this Section.

The words "willful" and "intentional" do not appear in section 1307. Hence, there are no criminal elements necessary for a violation of the Act under section 1307, which prohibits the uses of illegally intercepted conversations in court or legislative proceedings and in a broadcasts or publications. The federal statute on the other hand, 18 U.S.C. 2515, does not contain subsection B's prohibition against broadcasting or publishing the contents of an intercepted conversation. The federal counterpart provides only:

18 U.S.C. 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom any be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The federal statute's omission and Louisiana's inclusion of a specific prohibition against broadcasting and publishing illegally intercepted information indicates that the Louisiana legislators anticipated a separate and distinct use of intercepted information not contemplated by the federal statute.

The courts have indicated that these *second* "uses" or illegally obtained information are prohibited to all, lest the intended protection of our privacy rights have no effect and the statutory proscription of such disclosures are rendered impotent for their intended purpose. In *Gelbard v. United States*, 408 U.S. 41 (1972), the United States Supreme Court exhaustively reviewed the legislative history of the federal counterpart of Louisiana's section 1307 and concluded that "the protection of privacy was an overriding congressional concern" when it enacted the federal statute, and that 18 U.S.C. 2515's "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." *Gelbard*, 408 U.S. at 50.

The *Gelbard* Court reversed contempt findings against witnesses who refused to testify in court to the contents of intercepted conversations. The Court recognized that an invasion of privacy does not end when an interception occurs, but is compounded by disclosures in court or elsewhere. The Court reasoned that the testimony of witnesses compounds the statutorily proscribed invasion of privacy by adding to the injury of the interception the insult of disclosure. Similarly, in the present case, the impact of this second invasion of privacy by Avoyelles Publishing is not lessened by the circumstances that the disclosing party is merely the recipient of a

communication illegally intercepted by an allegedly guilty interceptor.

The *Gelbard* Court made it clear that Title III makes illegal not only unauthorized interceptions but also the disclosure and use of information obtained through such interceptions. Otherwise, the witness becomes the victim, once again, of a federal crime. *Gelbard* went on to articulate that even the prosecutor who pursues unchecked a course of conduct involving the use of intercepted communications can subject himself to "heavy civil and criminal penalties." *Id.* at 52. In Louisiana, prosecutors, attorneys, courts, newspapers, and entities "disclosing" and "using" illegally intercepted information under La.R.S. 15:1303 are all subject to criminal penalties and imprisonment if they disclose or use the information knowing or having reason to know that it was illegally obtained. However, we also find that these "second users" can be liable for civil penalties under section 1312 without the imprisonment mandated in section 1303. Again, Louisiana's inclusion of a particular violation for broadcasting and publishing this information in a section that does not mandate imprisonment or use the terminology associated with criminal intent, distinguishes the Louisiana statutes from the federal statutes and cases interpreting them.

A literal reading of the statute is mandated by La.Civ.Code art. 9, which instructs that when the law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature. We find that the Louisiana

statute is clear and unambiguous, and susceptible of a literal interpretation.

Both plaintiffs have alleged use and publication by the defendant of intercepted communications and have submitted affidavits that they never gave authority or consent for any communication between them to be intercepted, taped, disseminated or published, or used in any way. The defendants, however, have not submitted any rebuttal evidence and in fact have not denied that the contents of the communications were published; instead, publication is impliedly conceded. On the face of section 1307, and under a literal interpretation of that section, the plaintiffs need do no more than prove publication in order to prevail at trial against the defendant newspapers for a violation of section 1307B.

While summary judgments are now favored to secure a just and speedy determination of actions, pursuant to the 1996 amendment to La.Code. Civ.P. art, 966, the burden of proof has not changed. The initial burden is still on the mover, who must show that there is no genuine issue as to material fact ***and*** that the mover is entitled to summary judgment as a matter of law. Only after the mover has met its initial burden of production must the opposition submit evidence showing the existence of specific facts establishing a genuine issue of material fact effectively shifting the burden of production to the non-moving party. *Pellerin v. Thibodeaux,* 98-181 (La.App. 3 Cir. 6/17/98); 716 So.2d 131. We find that Avoyelles Publishing has not met its initial burden and is not entitled to summary judgment.

La.R.S. 15:1312 Provides for Civil Damages Without Criminal Willfulness; Federal Statute, 18 U.S.C. 2520, Requires Intent

Louisiana Revised Statutes 15:1312 provides no criteria for criminal "willfulness" but only provides for recovery of civil damages, including attorney fees and punitive damages, to persons whose communications have been intercepted without consent of either party. More specifically, Louisiana's section 1312 provides in pertinent part:

> 1312. Recovery of civil damages authorized
>
> A. Any person whose wire or oral communication is intercepted, disclosed or ***used*** in violation of this Chapter **shall have a civil cause of action against any person who** intercepts, **discloses, or uses,** or procures any other person to intercept, disclose, or use **such communications,** and be entitled to recover from **any such person**:
>
> (1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater.
>
> (2) A reasonable attorney's fee and other litigation costs reasonably incurred.
>
> (3) Punitive damages.
>
> B. A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this Chapter.

The defendants cite *Malouche v. JH Management Co., Inc.*, 839 F.2d 1024 (4th Cir. 1988), which held that civil liability for unlawful wiretapping under the federal counterpart to Louisiana section 1312, which is 18 U.S.C. 2520,

required proof of criminal willfulness. *Malouche* found that the plaintiff had only "very slight" evidence supporting the factual allegations that his office phone was tapped by the defendant, no evidence as to who installed the device or why, and no evidence that the defendant had knowledge or criminal willfulness under pre-1986 federal statute 18 U.S.C. 2511. In the present case, the alleged interceptor called a press conference, played the tapes, and handed out hard-copy transcriptions of the tapes. Hence, *Malouche* is distinguishable where it involved only the alleged criminal interceptor, and did not involve the mere "user" of the previously intercepted information.

Moreover, neither *Malouche* nor 18 U.S.C. 2520 is controlling in this case, where the language of the federal statute, section 2520, is different from the language of the Louisiana statute. More specifically, the federal statute provides in pertinent part:

> 18. U.S.C. 2520. Recovery of civil damages authorized
>
> (a) In general. – Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, ***or intentionally used*** in violation of this chapter **may in a civil action recover from the person or entity which engaged in that violation** such relief as may be appropriate. . . .

while the Louisiana statute, as previously indicated, provides

1312. Recovery of civil damages authorized

> A. Any person whose wire or oral communication is intercepted, disclosed, **or *used*** in violation of this Chapter **shall have a civil cause of action against any person who** intercepts, **discloses, or uses,** or procures any other person to intercept, disclose, or use **such communications,** and be entitled to recover from **any such person** . . .

Hence, while the federal statute requires an "intentional use," the Louisiana statute does not include the word "intentional" or "willful" in any part of section 1312 providing for civil remedy, but only requires "use." Moreover, federal section 2520 provides that the intercepted party ***may*** obtain a civil recovery from **"the person" who engaged** in the violation indicating that a civil recovery may be available against the same party who unlawfully intercepted the conversation. As stated, the federal statute does not contain a separately proscribed violation for "publishing" contents illegally obtained by another, while in Louisiana, the publisher and the interceptor can clearly be different parties. This is supported by the language in Louisiana's section 1312 providing that the aggrieved party ***shall have*** a civil remedy ***against "any" person*** who intercepts ***or*** discloses ***or*** uses, the communication, not just *"the" person* who engaged in the interception.

There exists no Louisiana jurisprudence defining "disclosure" and "use" of the contents of intercepted information under section 1312. Webster's Ninth New Collegiate Dictionary defines disclosure as "exposure," "the act of disclosing;" and defines "disclose" as "to expose to view," "to make known or public." There is no

requirement in sections 1303, 1307, or 1312 that the disclosure or use of the contents of the illegally obtained communication must be a first or initial disclosure. In this court's view, there is no tenable argument that would convince this court that a newspaper publication does not make information "known or public." any argument that attempts to show that a newspaper publication does not disclose or expose information to view is not grounded in logic.

The record indicates that this newspaper defendant disclosed the contents of the subject communications to the public at large, even though its disclosures were secondary to the alleged initial disclosure by Aymond to the press. Likewise, when the newspapers took the information and printed it, they did not merely report allegations made at a recent press conference based upon taped conversations between the plaintiffs; they "used" the contents to sell papers, to solicit advertisements, and for any other uses a paper makes of the information it gathers. Hence, the press's publication of the intercepted information is a "use" and a "disclosure" under sections 1307 and 1312.

Therefore, under a literal interpretation of the Louisiana statute, sections 1307 and 1312, the plaintiffs, Keller and Johnson, may have civil remedies available to them against the newspapers for publishing the contents of their conversation without the necessity of a finding of criminality leading to imprisonment under section 1303. The civil damages under section 1312 are clear and unambiguous, and include actual damages, reasonable attorney fees, and punitive damages. Accordingly, we find that as a matter of law, Avoyelles Publishing is not entitled to

summary judgment under sections 1307 and 1312 where criminal willfulness is not required.

As to the "willful" use and disclosure under section 1303 resulting in criminal penalties and imprisonment, the plaintiffs in their Opposition to the Avoyelles Publishing's Motion for Summary Judgment, attempt to show that the newspaper willfully and intentionally used the information in violation of section 1303. The word willful often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. It may *generally* mean in a criminal statute that the act was done with a bad purpose; without a justifiable excuse; or stubbornly, obstinately, or perversely. However, "willfully" is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by careless disregard whether or not one has the right so to act. *See United States v. Murdock*, 290 U.S. 389 (1933).

The plaintiffs have filed into the record an affidavit attesting that one reporter involved thought that the communications handed out at the press conference were illegally intercepted. Such evidence creates an issue of fact as to the knowledge of the newspaper. Even without evidence of certain knowledge, the circumstances themselves create issues of fact wherein it seems that any reporter handed an audiotape and transcript of a private conversation between parties not in attendance would have "reason to know" that the communications were obtained without consent. Accordingly, summary judgment in favor of Avoyelles Publishing under section 1303 is not appropriate.

IV.

CONCLUSION

Accordingly, we reverse the summary judgment granted by the trial court to Avoyelles Publishing, and we find that as a matter of law, criminal willfulness is not a requirement for civil damages under La.R.S. 15:1312 for "secondary" disclosures and publication of previously intercepted communications under La.R.S. 15:1307. We also find that issues of fact exist regarding the newspaper's "willfulness" of conduct, and its "knowledge" or "reason to know" that the information it published was illegally obtained, precluding summary judgment under La.R.S. 15:1303. Finally, we find that La.R.S. 15:1301 et sequitur violates neither the federal nor state constitutional guarantee of freedom of the press.

We remand for further proceedings.

All costs shall be cast against the defendants-appellees.

REVERSED AND REMANDED.

> 1302. Definitions

As used in this Chapter:

(1) "Aggrieved person" means a person who was party to any intercepted wire or oral communication or a person against whom the interception was directed.

(2) "Attorney for a governmental entity" means an attorney on the staff or under the direct supervision of the district attorney authorized by law to prosecute such offenses as are subject of the pen register or trap and trace device.

(3) "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception.

(4) "Communications common carrier" means any person engaged as a common carrier for hire in communication by wire or radio; however, a person engaged in commercial radio broadcasting which is supervised by the Federal Communications Commission shall not, insofar as such person is so engaged, be deemed a common carrier.

(5) "Contents" when used with respect to any wire, electronic, or oral communication includes any information concerning the substance, purport, or meaning of that communication.

(6) "Court of competent jurisdiction" means state district courts of general criminal jurisdiction and those courts exercising appellate jurisdiction thereof.

(7)(a) "Electronic communication" means any transfer of signs, signals, writings, images, sounds, data, or

intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system, but does not include any of the following:

(i) Any oral communication.

(ii) Any communication made through a tone-only paging device.

(iii) Any communication from a tracking device used to locate a mobile object by emission of a sound signal.

(b) "Electronic communication" specifically includes the radio portion of a cordless, portable, or cellular telephone communication that is transmitted between the cordless, portable, or cellular handset and the base or transmitting tower or unit.

(8) "Electronic communications service" means any service which provides to users thereof the ability to send or receive wire or electronic communications.

(9) "Electronic communications system" means any wire, radio, electromagnetic, photo-optical, or photo-electronic facilities used for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communication.

(10) "Electronic, mechanical, or other device or means" denotes any device or apparatus which can be used to intercept a wire, electronic, or oral communication other than:

(a) Any telephone or telegraph instrument, equipment, or facility, or any component thereof, either:

(i) Furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or

(ii) Being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties.

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal.

(11) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(12) "Investigative or law enforcement officer" means any commissioned state police officer of the Department of Public Safety and Corrections who, in the normal course of his law enforcement duties, is investigating an offense enumerated in this Chapter, and the district attorney authorized by law to prosecute or participate in the prosecution of such offense.

(13) "Judge" means the senior judge of a judicial district court of the state, any judge of the Orleans Parish Criminal District Court, or a judge designated by a majority vote of the court in writing in advance to consider applications for warrants or orders under this Chapter.

(14) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception

under circumstances justifying such expectation, but such term does not include any electronic communication.

(15) "Pen register" means a device which records and decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached, but this term does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business.

(16) "Person" means any employee or agent of the state or a political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation.

(17) "Trap and trace device" means a device or electronic means which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted, except that it shall not include a service, device, or electronic means tariffed by the Louisiana Public Service Commission, used by a subscriber of telecommunicational services to receive the telephone numbers for calls placed to the subscriber.

(18) "Wire communication" or "communication by wire" means any aural transfer made in whole or in part through the use of facilities used for the transmission of communications by aid of wire, cable, or other like connection between the points of origin and reception,

including the use of such connection in a switching station, furnished or operated by any person licensed to engage in providing or operating such facilities for the transmission of communications and such term includes any electronic storage of such communication, and such term includes the radio portion of a cordless, portable, or cellular telephone communication that is transmitted between the cordless, portable, or cellular handset and the base or transmitting tower or unit.

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> LOUISIANA REVISED STATUTES
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> CHAPTER 10. ELECTRONIC SURVEILLANCE
> PART II. INTERCEPTION OF COMMUNICATIONS AND RELATED MATTERS

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S> 1303. Interception and disclosure of wire, electronic, or oral communications

A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person to:

(1) Willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire or oral communication;

(2) Willfully use, endeavor to use, or procure any other person to use or endeavor to use, any electronic,

mechanical, or other device to intercept any oral communication when:

(a) Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(b) Such device transmits communications by radio or interferes with the transmission of such communication;

(3) Willfully disclose, or endeavor to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection; or

(4) Willfully use, or endeavor to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this Subsection.

B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor, without benefit of probation, parole, or suspension of sentence.

C. (1) It shall not be unlawful under this Chapter for an operator of a switchboard, or any officer, employee, or agent of any communications common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in

any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; however, such communications common carriers shall not utilize service observing or random monitoring, except for mechanical or service quality control checks.

(2) It shall not be unlawful under this Chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of Chapter 5 of Title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(3) It shall not be unlawful under this Chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. Such a person acting under color of law is authorized to possess equipment used under such circumstances.

(4) It shall not be unlawful under this Chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of the

state or for the purpose of committing any other injurious act.

(5) It shall not be unlawful under this Chapter:

(a) For the ultimate receiver of wire or electronic communication, or an investigative or law enforcement officer to use a pen register or trap and trace device as provided in Part III of this Chapter.

(b) For a provider of electronic communication services to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, or another provider furnishing service toward the completion of the wire or electronic communication, or a user of that service, from fraudulent, unlawful, or abusive use of such service.

(c) To use a device which captures the incoming electronic or other impulses which identify the numbers of an instrument from which a wire communication was transmitted.

(6) A person or entity providing electronic communication services to the public shall not intentionally divulge the contents of any communication while in transmission of that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient except:

(a) As otherwise authorized by federal or state law.

(b) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination.

(c) Any electronic communication inadvertently obtained by the service provider and which appears to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

D. Upon receipt of the information or evidence sought by the interception, the interception shall cease.

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S> 1304. Manufacture, distribution, or possession of wire or oral communication intercepting devices prohibited

A. Except as otherwise specifically provided in this Chapter, it shall be unlawful for any person willfully to manufacture, assemble, possess, or sell any electronic, mechanical, or other device, knowing or having season to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications.

B. Any person who violates the provisions of this Section shall be fined not more than ten thousand dollars and imprisoned for not less than two years nor more than ten years at hard labor, without benefit of probation, parole, or suspension of sentence.

C. It shall not be unlawful under this Section for:

(1) A communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier's business in the normal course of the communications common carrier's business, or

(2) An officer, agent, or employee of, or a person under contract with the United States or a commissioned state police officer of the Louisiana Department of Public Safety and Corrections specially authorized by the deputy secretary of public safety services in writing to possess or use pursuant to court authorization, in the normal course of the activities of the Department of Public Safety and Corrections, to manufacture, assemble, possess, or sell any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications.

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S> 1305. Confiscation of wire or oral communication intercepting devices

Any electronic, mechanical, or other device used, manufactured, assembled, possessed, sold, or advertised in violation of > R.S. 15:1304 may be seized. Upon seizure, it is forfeited to the state and may be disposed of by the state. No device shall be sold at public or private sale. Any competent judge in whose jurisdiction the device was seized or the judge of the trial court may order the device destroyed or may order it transferred without cost to the Department of Public Safety and Corrections.

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S> 1306. Immunity of witnesses

Whenever in the judgment of the attorney general or a district attorney, the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the state involving any violation of this Chapter or any of the offenses enumerated in > R.S. 15:1308, or any conspiracy to violate this Chapter or any of the offenses enumerated in > R.S. 15:1308, is necessary to the public interest, the attorney general or such district attorney, with the approval of the attorney general, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this Section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-

incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding against him in any court, except that no witness shall be exempt under this Section from prosecution for perjury or contempt of court committed while giving testimony or producing evidence under compulsion as provided in this Section. Failure to so testify shall be punishable as contempt of court.

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S> 1307. Prohibition of use as evidence of intercepted wire or oral communications

A. Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision

thereof, if the disclosure of that information would be in violation of this Chapter.

B. No person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation of the provisions of this Chapter unless such dissemination or distribution is made to an investigator or law enforcement officer conducting an investigation into a violation of the provisions of this Section.

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S> 1308. Authorization for interception of wire or oral communications

A. The attorney general, with the approval of the district attorney in whose district the interception of wire or oral communications shall take place, and the district attorney, with the approval of the attorney general, may authorize an application to a judge in whose district the

interception of wire or oral communications shall take place, and such judge may grant in conformity with > R.S. 15:1310 an order authorizing or approving the interception of wire or oral communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of:

(1) Any violation of the Uniform Controlled Dangerous Substance Act by:

(a) Producing, manufacturing, distributing, or dispensing a controlled dangerous substance; or

(b) Possessing with intent to produce, manufacture, distribute, or dispense a controlled dangerous substance; or

(c) Creating, distributing, or possessing a counterfeit controlled dangerous substance; or

(d) Conspiring to commit any of the above enumerated offenses.

(2) The commission, attempted commission, or conspiracy to commit a crime involving any of the following offenses:

(a) First or second degree murder.

(b) Aggravated kidnapping.

(c) Aggravated arson.

(d) Manufacture and possession of delayed action incendiary device or manufacture and possession of a bomb.

(e) Armed robbery.

(f) Jury tampering.

(g) Solicitation for murder.

(h) Arson with intent to defraud.

(i) Extortion.

(j) Felony violations of the Uniform Controlled Dangerous Substances Law.

(k) Intimidating, impeding, injuring witnesses or injuring officers.

(l) Any felony offense where the offense was or is to be committed against a law enforcement officer as a result of his official capacity or actions.

(m) Money laundering as defined in > R.S. 14:230.

(n) Transactions involving proceeds from drug offenses as defined in > R.S. 40:1049.

B. Failure of the district attorney to obtain approval for the interception of wire or oral communications as set forth in this Section shall constitute cause for the attorney general to institute, prosecute, or intervene in a criminal action or proceeding as authorized by law.

LA-ST-ANN – LA R.S. 15:1309
LSA-R.S. 15:1309

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S> 1309. Authorization for disclosure and use of intercepted wire or oral communications

A. Any investigative or law enforcement officer who, by any means authorized by this Chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure, and provided that such disclosure of the contents of any wire or oral communication, or evidence derived therefrom, relates directly to the offense for which the order was granted.

B. Any investigative or law enforcement officer who, by any means authorized by this Chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

C. Any person who has received, by any means authorized by this Chapter, any information concerning a

wire or oral communication, or evidence derived therefrom, intercepted in accordance with the provisions of this Chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of the state or in any federal or state grand jury proceeding.

D. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this Chapter shall lose its privileged character.

E. When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications, obtains knowledge of communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in Subsections A, B and C of this Section.

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LA-ST-ANN - LA R.S. 15:1310
LSA-R.S. 15:1310

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S> 1310. Procedure for interception of wire or oral communications

A. Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge in whose district such interception of wire or oral communication shall take place and shall state the applicant's authority to make such application. Each application shall include the following information:

(1) The identity of the investigative or law enforcement officer making the application and the person authorizing the application.

(2) A full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including:

(a) Details as to the particular offense that has been, is being, or is about to be committed,

(b) A particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted,

(c) A particular description of the type of communications sought to be intercepted, and

(d) The identity of the person, if known, committing the offense and whose communications are to be intercepted.

(3) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous, or that such circumstances exist that without immediate action a human life may be endangered.

(4) A statement of the period of time for which the interception is required to be maintained, which shall not exceed thirty days.

(5) When the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(6) A full and complete statement of the facts concerning previous applications for the past five years, known to the individuals authorizing and making the application, made to any judge for authorization to intercept, or for approval of interception of, wire or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application.

B. (1) If statements of an identified or unidentified informant are relied upon in the application as a basis for establishing that there are reasonable grounds to believe that an offense has been, is being, or is about to be committed, the application shall set forth the factual basis for the affiant's belief that the informant is credible and that the information has been obtained in a reliable manner. The informant shall be presented to the judge and be sworn to afford the judge opportunity to inquire if the statements made in the application are true. The application shall so state that the informant was presented to the judge and sworn for such purpose. This provision shall not affect the privileged character of the identity of an informant. Nothing herein shall be construed to require the identification of a confidential informant.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence.

C. Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the district in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that:

(1) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in > R.S. 15:1308.

(2) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception.

(3) There is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense or are leased to, listed in the name of, or commonly used by such person.

(4) There is reason to believe that investigative procedures have been tried and failed or they reasonably appear to be unlikely to succeed if tried or to be dangerous, or that such circumstances exist that without immediate action a human life may be endangered.

(5) The interception of wire or oral communications, as planned, is not reasonably expected to intercept privileged communications.

D. Each order authorizing or approving the interception of any wire or oral communication shall specify:

(1) The identity of the person, if known, whose communications are to be intercepted.

(2) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted.

(3) A particular description of the type of communication sought to be intercepted and a statement of the particular offense to which it relates.

(4) The identity of the agency authorized to intercept the communications, the person applying for the application, and the person authorizing the application.

(5) The period of time during which such interception is authorized.

E. No order entered under this Section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the investigation, and in no event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with Subsection A of this Section and the court's making the findings required by Subsection C of this Section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty successive days or until the described type of communication has been obtained. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this Chapter, and must terminate upon completion of the investigation or expiration of the order.

F. (1) The contents of any wire or oral communication intercepted by any means authorized by this Chapter shall be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this Subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recording shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying

judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of > R.S. 15:1309(A) and (B) for investigations. The presence of the seal provided for by this Subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under > R.S. 15:1309(C).

(2) Applications made and orders granted under this Chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge in whose district the interception of wire or oral communication took place and shall not be destroyed, except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(3) Any violation of the provisions of this Subsection may be punished as contempt of the issuing or denying judge.

(4) Within a reasonable time, but not later than ninety days after the filing of an application for an order of approval, the issuing judge shall cause to be served, on the persons named in the order of the application, and such other parties to intercepted communications as the judge may determine in his discretion to be in the interest of justice, an inventory which shall include notice of:

(a) The fact of the entry of the order or the application;

(b) The date of the entry and the period of authorized, approved, or disapproved interception, or the denial of the application; and

(c) The fact that during the period wire or oral communications were or were not intercepted. The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications, and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge in whose district the interception of wire or oral communications took place, the serving of the inventory required by this Subsection may be postponed until such time as may be appropriate in the circumstances.

(5) Whenever an order authorizing the interceptions is entered pursuant to this Chapter, the order shall require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

G. The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in any court unless each party, not less than thirty days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This thirty-day period may be waived by the judge if he finds that it was

not possible to furnish the party with the above information thirty days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

H. (1) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the state, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or

(a) The communication was unlawfully intercepted;

(b) The order of authorization or approval under which it was intercepted is insufficient on its face; or

(c) The interception was not made in conformity with the order of authorization or approval.

(2) Such motion shall be made before the trial, hearing, or proceeding, unless there was not opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this Chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portion of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(3) In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion to suppress made under this Subsection, or the

denial of any application for an order of approval, if the attorney general or district attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

14B

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LA-ST-ANN – LA R.S. 15:1311
LSA-R.S. 15:1311

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S> 1311. Reports concerning intercepted wire or oral communications

A. Within twenty days after the expiration of an order, or such extension thereof, entered under > RS

15:1310 or the denial of an order approving an interception, the issuing or denying judge shall report to the judicial administrator of the supreme court:

(1) The fact that an order or extension was applied for.

(2) The kind of order or extension applied for.

(3) The fact that the order or extension was granted as applied for, was modified, or was denied.

(4) The period of interceptions authorized by the order, and the number and duration of any extensions of the order.

(5) The offense specified in the order or application, or extension of an order.

(6) The identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application.

(7) The nature of the facilities from which or the place where communications were to be intercepted.

B. In January of each year the district attorneys shall report to the attorney general and in March of each year the attorney general shall report to the judicial administrator of the supreme court the following information:

(1) The information required by Paragraphs (1) through (7) of Subsection A of this Section with respect to each application of an order or extension made during the preceding calendar year.

(2) A general description of the interceptions made under such order or extension, including:

(a) The approximate nature and frequency of incriminating communications intercepted,

(b) The approximate nature and frequency of other communications intercepted,

(c) The approximate number of persons whose communications were intercepted, and

(d) The approximate nature, amount, and cost of the manpower and other resources used in the interceptions.

(3) The number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made.

(4) The number of trials resulting from such interceptions.

(5) The number of motions to suppress made with respect to such interceptions, and the number granted or denied.

(6) The number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions.

(7) The information required by Paragraphs (2) through (6) of this Subsection with respect to orders or extensions obtained in the preceding calendar year.

C. In April of each year the judicial administrator of the supreme court shall transmit to the legislature a full

and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the judicial administrator. The judicial administrator may issue binding regulations dealing with the content and form of the reports required to be filed by Subsections A and B of this Section.

LA-ST-ANN – LA R.S. 15:1312
LSA-R.S. 15:1312

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S> 1312. Recovery of civil damages authorized

A. Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this Chapter shall have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other

person to intercept, disclose, or use such communication, and be entitled to recover from any such person:

(1) Actual damages, but not less than liquidated damages computed at the rate of one hundred dollars a day for each day of violation or one thousand dollars, whichever is greater.

(2) A reasonable attorney's fee and other litigation costs reasonably incurred.

(3) Punitive damages.

B. A good faith reliance on a court order shall constitute a complete defense to any civil or criminal action brought under this Chapter.

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LSA-R.S. 15:1313

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S> 1313. Pen registers and trap and trace devices, use prohibited

A. Except as provided in this Section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under > R.S. 15:1315 of this Part.

B. The prohibition of this section does not apply with respect to the use of a pen register or a trap and trace device by a provider of a wire or electronic communication service:

(1) Relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse of service or unlawful use of service.

(2) To record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful, or abusive use of service, or with the consent of the user of that service.

C. Whoever intentionally violates Subsection A of this Section shall be fined not more than five thousand dollars, or imprisoned not more than one year, or both.

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LA-ST-ANN - LA R.S. 15:1314
LSA-R.S. 15:1314

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S> 1314. Application for an order for a pen register or a trap and trace device

A. An investigative or law enforcement officer may make application for an order or an extension of an order under > R.S. 15:1315 to a court of competent jurisdiction authorizing or approving the installation and use of a pen register or a trap and trace device under this Part, in writing under oath or equivalent affirmation, to a court of competent jurisdiction of this state. For the purposes of > R.S. 15:1313 through 1316 only, "investigative or law enforcement officer" means:

(1) Any commissioned officer of the office of state police.

(2) Any full-time commissioned city police officer of a municipality of this state.

(3) Any sheriff or a deputy sheriff of a parish of this state which has been specifically designated by the sheriff

of that parish as responsible for preparation of applications for installation and use of pen register or trap and trace devices.

B. An application made pursuant to this section shall include:

(1) The identity of the investigative or law enforcement officer making the application and the identity of the law enforcement agency conducting the investigation.

(2) A certification by the applicant attesting that the information sought is relevant to an ongoing felony criminal investigation being conducted by that agency, and includes in that certification a recital of facts or information constituting the reasonable suspicion upon which the application is based.

(3) A certification by the appropriate agency head that he has reviewed the application and approves the use of the pen register or trap and trace device for that investigation.

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LA-ST-ANN - LA R.S. 15:1315
LSA-R.S. 15:1315

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S> 1315. Issuance of an order for a pen register or a trap and trace device

A. Upon an application made under > R.S. 15:1314, the court may enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court if the court finds that the investigative or law enforcement officer has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing felony criminal investigation, and that the certification does include reasonable suspicion as required by > R.S. 15:1314.

B. (1) An order issued under this Section shall specify:

(a) The identity, if known, of the person to whom is leased or in whose name is listed the telephone line to which the pen register or trap and trace device is to be attached.

(b) The identity, if known, of the person who is the subject of the criminal investigation.

(c) The number and, if known, physical location of the telephone line to which the pen register or trap and trace device is to be attached and, in the case of trap and trace, the geographic limits of the trap and trace order.

(d) A statement of the offense to which the information likely to be obtained by the pen register or trap and trace device relates.

(2) An order issued under this Section shall direct, upon request of the applicant, the furnishing of information, facilities, and technical assistance necessary to accomplish the installation of the pen register or trap and trace device under > R.S. 15:1316.

C. (1) An order issued under this Section shall authorize the installation and use of a pen register or a trap and trace device for a period not to exceed ten days.

(2) Extensions of such an order may be granted, but only upon an application for an order under > R.S. 15:1314 and upon the judicial finding required by Subsection A of this Section. The period of extension shall be for a period not to exceed ten days.

D. An order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that:

(1) The order be sealed until otherwise ordered by the court, or until one hundred eighty days after the installation's authorized operation concludes, whichever is earlier.

(2) The person owning or leasing the line to which the pen register or trap and trace device is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber, or to any other person, unless or until otherwise ordered by the court.

E. The head of each law enforcement agency possessing or making application for the installation and use of a pen register or trap and trace device shall establish and implement procedures which shall provide for and ensure the following:

(1) Preparation and maintenance of such logs and records which record, after unsealing of the applications and orders, the approval of applications for installation and use of pen register or trap and trace devices and the duration thereof.

(2) That only the law enforcement agency chief officer or specifically authorized representative of the agency chief shall have the authority to authorize the installation and use of pen register or trap and trace devices and only pursuant to court order.

(3) That no pen register or trap and trace device in the possession of the law enforcement agency shall be subject to unauthorized installation or use.

(4) That a designated sworn and commissioned officer of that law enforcement agency executes and transmits no later than March first of each calendar year to the deputy secretary of public safety services of the Department of Public Safety and Corrections, a sworn affidavit

stating that, to the best of the affiant's knowledge, information and belief, all installations and uses of the pen register or trap and trace devices in the custody of that law enforcement agency have been in accordance with the provisions of this Part and further that no pen register or trap and trace device in the custody of that agency has been the subject of an unauthorized or illegal installation or use.

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LA-ST-ANN – LA R.S. 15:1316
LSA-R.S. 15:1316

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S> 1316. Assistance in installation and use of a pen register or a trap and trace device

A. Upon the request of an investigative or law enforcement agency authorized to install and use a pen register under this Part, a provider of a wire or electronic

communication service, landlord, custodian, or other person shall furnish such investigative or law enforcement officer forthwith all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if such assistance is directed by a court order as provided in > R.S. 15:1315(B)(2).

B. Upon the request of an officer of a law enforcement agency authorized to receive the results of a trap and trace device under this Part, a provider of a wire or electronic communication service, landlord, custodian, or other person shall, if technically possible, install such device forthwith on the appropriate line and shall furnish such investigative or law enforcement officer all additional information, facilities, and technical assistance including installation and operation of the device unobtrusively and with a minimum of interference with the services that the person so ordered by the court accords the party with respect to whom the installation and use is to take place, if such installation and assistance is directed by a court order as provided in > R.S. 15:1315(B)(2). Unless otherwise ordered by the court, the results of the trap and trace device shall be furnished to the investigative or law enforcement officer designated in the court order, at reasonable intervals during the regular business hours for the duration of the order.

C. A provider of a wire or electronic communication service, landlord, custodian, or other person who furnishes facilities or technical assistance pursuant to this

Section shall be compensated for such reasonable expenses incurred in providing such facilities and assistance.

D. No cause of action shall lie in any Louisiana court against any provider of a wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order under this Part.

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No. 99-42

In The

Supreme Court of the United States

CENTRAL NEWSPAPERS, INC.,

Petitioner,

v.

MICHAEL J. JOHNSON and McKINLEY KELLER,

Respondents.

On Petition For A Writ Of Certiorari To The Third Circuit Court Of Appeal Of The State Of Louisiana

AVOYELLES PUBLISHING COMPANY AND RANDY DECUIR'S RESPONSE TO CENTRAL NEWSPAPERS, INC.'S PETITION FOR A WRIT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

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JURISDICTION

Whether this Court has jurisdiction under 28 U.S.C. § 1257 is an issue.

STATEMENT OF THE CASE

We agree with petitioner's Statement of the Case (Pet., at 2-5), with two additions. First, the district court's rulings on both CNI's Peremptory Exception of No Cause of Action and Avoyelles' motion for summary judgment rely on an earlier ruling by the same judge involving reporters for CNI and Avoyelles. That ruling, designated "In Re: A Matter Under Investigation," is referenced and quoted in the district court opinion granting CNI's Peremptory Exception of No Cause of Action. (Pet., App. B at 28a – 29a)

Second, plaintiffs Keller and Johnson appealed certain rulings by the district court in this case directly to the Louisiana Supreme Court on the ground that the district court had declared the wiretap statute unconstitutional. In both instances, the Louisiana Supreme Court found that it lacked jurisdiction by way of appeal because a constitutional issue was not properly presented. On the first occasion, which involved another co-defendant (Aymond), the court remanded the case to the district court. (App. A) On the second occasion, involving Avoyelles, the court remanded the case to the Third Circuit (App. B), which then issued the decision for which review was sought in the state supreme court, and which is now the subject of this writ. On both those occasions, the orders of the Louisiana Supreme Court used the same

language in saying that the district court ruling "never rendered the [statute/Act] unconstitutional." *Keller v. Aymond*, 97-CA-2203, 97-CA-2204 (La. 11/19/97), 702 So.2d 1387 and 98-CA-0552, 98-CA-0553 (La. 4/23/98), 717 So.2d 1171. (App. A and App. B)

ARGUMENT

This Court has directed that Avoyelles Publishing Company and Randy Decuir (hereinafter collectively referred to as "Avoyelles") respond to the petition for certiorari filed by their co-defendant, Central Newspapers, Inc. (hereinafter referred to as "CNI"), publisher of *The Alexandria Daily Town Talk*. CNI has asked this Court to review the constitutionality of Louisiana's wiretap statute as interpreted by a Louisiana state appellate court to apply to a newspaper and its reporter when they publish the contents of an illegal wiretap made and publicly disclosed by a third party.

We agree completely with the petitioner on the merits. Our position from the start has been that to apply Louisiana's wiretap statute (LSA – R.S. 15:1301 et seq.) to the media on these facts offends the First Amendment. We consider the constitutional issue extremely significant not only for our clients but for all media throughout the country, both the traditional newspaper, radio, and television media and also the emerging electronic forms of media. The blatantly wrong-headed ruling of Louisiana's Third Circuit Court of Appeals deserves a very prompt repudiation. In good faith, however, we are compelled to advise the Court that there is an issue as to whether the

petitioner has the necessary Article III standing because, although a party in the case, it was not a party to the ruling for which it requests review. There is also an issue as to whether the ruling below constitutes a "final judgment" as required by 28 U.S.C. § 1257.

As indicated in the petitioner's Statement of the Case (Pet. at 2-5), neither Avoyelles nor CNI pressed the constitutional issue in the district court nor in the separate appeals heard by different panels of the Third Circuit Court of Appeals. Prior to the decision by the second panel, which came on the Avoyelles ruling, both CNI and Avoyelles had argued that the Louisiana courts should construe the state's wiretap statute narrowly so as to avoid a clash with the First Amendment. We did not, and could not, claim that the state wiretap statute was facially unconstitutional, but only that – unless narrowly construed – the statute would be unconstitutional as applied on these facts. Indeed, the state wiretap statute, modeled as it is on the federal wiretap statute, 18 U.S.C. §§ 2510-2520, is constitutionally required under the Fourth Amendment for legitimate use of court-ordered wiretapping by law enforcement. *See Katz v. United States*, 389 U.S. 347 (1967).

In this conflict between the First and Fourth Amendments, Avoyelles has been navigating the narrow straits between the Scylla of the "case and controversy" limitations under Article III and the Charybdis of res judicata under state law. The defendants could not remove the case to federal district court under 28 U.S.C. § 1441 because the plaintiffs' claims, although rooted in privacy issues of the Fourth Amendment, did not "arise under"

federal statutory or constitutional law. *See Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934). Nor could a First Amendment defense confer federal question jurisdiction. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908). It was, nevertheless, necessary to bring the First Amendment issue to the attention of the state courts, as was done in the defendants' answers, in order to preserve for the defendants the option of eventually filing an action under 42 U.S.C. § 1983 in federal district court. *See England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964).

Prior to the ruling at issue here by the second panel, however, the First Amendment issue was not "ripe" in an Article III sense, *see Poe v. Ullman*, 367 U.S. 497 (1961), because the Louisiana Attorney General's Office had taken the position that the statute would not be applied to the reporters or newspapers involved. *See* the reference to "In Re: A Matter under Investigation" in the district court's ruling granting CNI's Peremptory Exception of No Cause of Action. (Pet., App. B at 28a) The rulings by the state district court had agreed with our position that the state wiretap statute should be narrowly construed not to apply, on these facts, to our clients. Given that neither defendant argued the constitutional issue to either the district or appellate courts, the gratuitous statement by the second panel of the Third Circuit Court of Appeals declaring the statute, as so construed, to be constitutional, while rendering the matter ripe for adjudication in the federal district court or remand, did not constitute a final judgment.

The same lack of finality under res judicata principles which allows the defendants to bring an action in federal

district court raises the issue as to whether this Court has jurisdiction, at this time, under 28 U.S.C. § 1257. While the ruling of the state court below is not a "final judgment" under Louisiana law, it seems to fall within a certain category of rulings which are nevertheless sufficient to confer jurisdiction under 28 U.S.C. § 1257.

I. CNI'S ARTICLE III STANDING IS AN ISSUE

As laid out in the section on "Proceedings Below" of the Petition (Pet. at 3-5), co-defendants CNI and Avoyelles filed motions at different points in time in these consolidated cases before the district judge. Although procedurally distinct (CNI filed a Peremptory Exception of No Cause of Action; Avoyelles filed a Motion for Partial Summary Judgment), the motions were substantively similar in arguing that the wiretap statute did not apply to the actions of the newspapers which are defendants in this case. Both defendants preserved the constitutional defenses in answers to the pleadings, but neither raised the constitutional issue as the basis for its motion. In each instance, the moving defendant argued that Louisiana's wiretap statute should be carefully construed to avoid offending the First Amendment by interpreting the language of the statute not to apply to reporters and newspapers who merely report what another party illegally discloses at a press conference. In ruling on CNI's motion, however, the district judge went further than requested and declared the wiretap statute unconstitutional under the First Amendment as applied to the facts. When the judge later ruled on Avoyelles' motion, he relied on his ruling on CNI's motion.

Although the two similar district court rulings were reversed on appeal, two separate panels of the Third Circuit gave very different reasons for reversal. In the appeal of the ruling in favor of CNI, which raised only state law defenses, the first panel of the Third Circuit Court of Appeals ruled that the trial court should not have reached the constitutional issue. A different panel of the Third Circuit, which reversed the ruling in favor of Avoyelles, gave the statute a very expansive interpretation which imposed absolute liability on reporters and newspapers. (Pet., App. A at 11a-12a) Like CNI, Avoyelles raised only state law defenses. Nevertheless, *sua sponte*, the second panel declared the statute did not violate the First Amendment.

Following the panel decision on the Avoyelles ruling, both Avoyelles and CNI petitioned the Louisiana Supreme Court for writs of certiorari. CNI was permitted by Louisiana law to seek review of the Avoyelles ruling even though CNI had not participated in the appellate court proceeding that produced that ruling. Louisiana law has been liberal in allowing even non-parties to appeal as long as the person is aggrieved by the ruling. LSA – C.C.P. Art. 2086; *Emmons v. Agricultural Insurance Co.*, 158 So.2d 594 (La. 1963); *Haas v. Haas*, 159 So. 384 (La. 1935); *Patten v. Powell*, 16 La. Ann. 128 (1861). CNI, which was certainly aggrieved by the ruling, sought review in the Louisiana Supreme Court, not by appeal, but by a petition for certiorari. The Louisiana Supreme Court's general supervisory jurisdiction, under the state constitution, "is plenary, unfettered by jurisdictional requirements." R. Stetter, *West's Louisiana Civil Appellate*

Procedure § 1:9 (1999). As long as the ruling of the appellate court was not a final judgment, which it was not, nothing bars the state supreme court from reconsidering an issue. *Id.* at § 1:38. Within the Louisiana court system, therefore, there was no doubt that CNI had standing to ask the state supreme court to review the appellate court's ruling as to Avoyelles even though CNI had not participated in that ruling.

The fact that a person has standing to raise an issue in state court does not necessarily confer Article III standing before this Court. In *U.S. ex rel. State of Louisiana v. Jack*, 244 U.S. 397 (1917), this Court considered the Louisiana law which allows a non-party to appeal and said it can have no effect on the procedure in federal courts. *Id.* at 403. *See also Karcher v. May*, 484 U.S. 72, 77 (1987) and *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), citing *Jack*. As stated in *Karcher*, this Court has "consistently applied the general rule that one who is *not a party or has not been treated as a party to a judgment* has no right to appeal therefrom." 484 U.S. at 77 (emphasis added). Although CNI is a party in the case, it may lack Article III standing because it was not a party to the ruling, the ruling was not a "judgment," and the ruling is not conclusive of the constitutional issue.

On the other hand, if this Court treats the ruling below as a "final judgment" for purposes of federal jurisdiction under U.S.C. § 1257, then the petitioner may have an "interest" sufficient to qualify as an "injury" establishing Article III standing. *Cf. Marino*, 484 U.S. at 304. ("The Court of Appeals suggested that there may be exceptions to this general rule [regarding appeal], primarily 'when the nonparty has an *interest that is affected by the trial*

court's judgment.' We think the better practice is for such a nonparty to seek intervention for purposes of appeal") (emphasis added; citation omitted).

II. JURISDICTION UNDER 28 U.S.C. § 1257 IS AN ISSUE

Both the standing and jurisdictional issues involve the petitioner's claim that the ruling constituted a "final adjudication of the federal constitutional issues, in advance of trial, that are conclusive of the federal constitutional defenses of both CNI and Avoyelles." (Pet. at 4-5) The ruling is not a final adjudication in the state courts on the constitutional issue. Nevertheless, the ruling seems to fit within one or two of the exceptions to the normal rules regarding the "final judgment" requirement of 28 U.S.C. § 1257 which were recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

A. "LAW OF THE CASE" IN LOUISIANA

The ruling of Louisiana's Third Circuit constitutes, at most, the "law of the case." We seriously doubt, however, that the *sua sponte* ruling on constitutionality by the second panel can properly be regarded as law of the case. "The 'law of the case' doctrine applies to prior rulings of the appellate court and/or supreme court in the same case." *Griggs v. Riverland Med. Ctr.*, 722 So.2d 15, 19 (La. App. 3d Cir. 1998). In this instance, the second panel's ruling conflicts with prior orders in this same case from the Louisiana Supreme Court. In both those rulings, the Louisiana Supreme Court dismissed in orders stating "the trial court's judgement never rendered the [statute/

Act] unconstitutional." (App. A and App. B) In the first ruling as to another co-defendant (Aymond) the order also stated "although the trial court's judgment makes certain references to the constitutionality of La. R.S. 13:1301 [sic] et seq., it is clear these statements are dicta, since the court has not yet reached the merits of the case before it." (App. A) In dismissing the appeal as to Avoyelles, the Court remanded to the Third Circuit Court of Appeals. It should have been very clear to the second panel of the Third Circuit that the issue of constitutionality was not presented.

The law of the case doctrine "applies to parties who were involved in the litigation at the time of the prior ruling *and had their day in court.*" *Griggs*, 722 So.2d at 19 (emphasis added). CNI did not participate in the Avoyelles appeal before the second panel, so that panel's ruling cannot be applied to it as law of the case. Moreover, just as the state supreme court regarded reference to the constitutionality of the Louisiana statute as dicta, so too are the similar references by the second appellate panel merely dicta. The references cannot therefore constitute "law of the case." *Id.* ("The 'law of the case' is discretionary, being inapplicable to cases in which the prior decision was palpably erroneous or its application would result in manifest injustice").

The Louisiana Supreme Court has laid out the procedural requirements necessary for properly presenting a constitutional challenge to a state statute, including a "hearing . . . held at which the constitutionality of the statute was contested." *Vallo v. Gayle Oil Co., Inc.*, 646 So.2d 859, 865 (La. 1994). No such contest over constitutionality has occurred in this case. As a result, Avoyelles

and CNI have the option, on remand, of moving the state district court to exclude the issue of constitutionality from any judgment. LSA – R.S. 13:4232, "Exceptions to the general rule of res judicata" ("A judgment does not bar another action by the plaintiff . . . (3) When the judgment reserved the right of the plaintiff to bring another action").[1] By electing to do so, the parties can preserve their option to file suit in federal district court challenging the constitutionality of the state wiretap statute as applied. *See England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964). If they elect not to exclude the constitutional issue, they certainly can raise the issue of constitutionality before the district court, the appellate court and the Louisiana Supreme Court, and argue it fully through the state courts.

B. THE STATE COURT RULING PRESENTED FOR REVIEW AND THE "FINAL JUDGMENT" REQUIREMENT OF 28 U.S.C. § 1257

Although CNI and Avoyelles do have these options under Louisiana law, as just discussed, the jurisdictional question remains this: should CNI and Avoyelles have to undergo a trial for damages under a state statute which clearly violates the First Amendment, when the state supreme court declined the opportunity to enforce the First Amendment? In terms of Louisiana law, the ruling is not a "final judgment." This Court's interpretation of the

---

[1] Although framed in terms of "the plaintiff," the provision would apply also to the defendant because plaintiff and defendant are equally bound by a final judgment. *See* LSA – R.S. 13:4231, "Res judicata."

term "final judgment" in 28 U.S.C. § 1257, however, has recognized certain exceptions to the rule which can bring a claim within this Court's jurisdiction. In this case, the Court's jurisdiction depends on a reading of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75 (1997). According to *Cox*, there are "at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. Of the four, the first and the fourth arguably apply to this case. Neither the second nor the third categories of exceptions mentioned in *Cox* apply to the present case, primarily because they involve situations in which the federal issue had been finally decided in a state court system. As explained in the "Law of the Case" section above, no such final decision in the Louisiana court system has yet occurred.

Some tension exists between *Cox* and *Jefferson*. While citing *Cox* approvingly, *Jefferson* seems to recognize only two categories of exceptions, those corresponding to the second and third of the four *Cox* categories. 522 U.S. at 82-4. Whereas *Cox* says that there are *"at least* four categories of such cases" 420 U.S. at 477 (emphasis added), *Jefferson* disapproves of expansion beyond *Cox*, as reflected by its disapproval of *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). 522 U.S. at 83-4. ("We now clarify that *Ritchie* does not augur expansion of the exceptions stated in *Cox Broadcasting Corp.*").

Jefferson fails to mention exceptions corresponding to the first and fourth categories discussed in *Cox*, the very

ones which are pertinent to the ruling below. Nevertheless, the language just quoted from *Jefferson* does confirm "the exceptions stated in *Cox Broadcasting Corp.*" *Id.* at 83-4. In the first category of exceptions recognized by *Cox*, the state court ruling may not actually be final, but this Court in appropriate circumstances has "deemed" the decision of the federal issue to be final. By way of example, *Cox* cites *Mills v. Alabama*, 384 U.S. 214 (1966) in which this Court took jurisdiction of a criminal case after a state supreme court ruling had upheld the constitutionality of a criminal statute and remanded the case for trial. In that case, as well as this one, the state court ruling, although not a final judgment, forces a trial on a clearly unconstitutional statute. The present case differs from *Mills* in not being a criminal case. But that fact only makes the argument for jurisdiction stronger in this case because the situation does not involve interference with an ongoing state criminal prosecution. *See Younger v. Harris*, 401 U.S. 37 (1971).

The present case also involves the fourth category of exceptions, the one on which jurisdiction rested in *Cox*. The Court's description of the fourth *Cox* exception is as follows:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling

> the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. *In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy,* the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.
>
> 420 U.S. at 482-3 (emphasis added).

Cox does involve a decision by the state's highest court that is "final" as to the constitutional issue. Here, the state's highest court has not ruled; it declined the opportunity to do so. The reasons given for jurisdiction in the fourth category of exceptions, however, do apply to the present case. Just as *Cox* guides our view that the construction of Louisiana's wiretap statute in the ruling below clearly violates the First Amendment, so too that case provides the rationale for claiming jurisdiction in this case.

> The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, *there should be no trial at all.* Moreover, even if appellants prevailed at trial and made unnecessary further consideration of the constitutional question, there *would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim disclosed in a public judicial proceeding may go forward despite*

> *the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim until after trial will 'leave unanswered . . . an important question of freedom of the press under the First Amendment,' 'an uneasy and unsettled constitutional posture (that) could only further harm the operation of a free press.'* On the other hand, if we now hold that the First and Fourteenth Amendments bar civil liability for broadcasting the victim's name, this litigation ends. *Given these factors – that the litigation could be terminated by our decision on the merits and that a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt – we find that reaching the merits is consistent with the pragmatic approach that we have followed in the past in determining finality.*
>
> 420 U.S. at 485-6 (emphasis added; citation and footnote omitted).

As in *Cox*, "there should be no trial at all" in this case.

Both the first and the fourth exceptions involve situations in which this Court has thought that state court rulings were forcing the petitioner to undergo a trial in a situation which was clearly barred by the Constitution, most notably the First Amendment, as in *Cox*. In considering as a factor that "the litigation could be terminated by [a] decision on the merits" 420 U.S. at 486, *Cox* acknowledges that "this factor involves consideration of the merits in determining jurisdiction." *Id.* at 487, n.13. In this case as well, the jurisdictional issue is intertwined with the First Amendment issue. At this point, the newspapers face a trial on the merits in district court unless

the trial court is willing to ignore the ruling of the Third Circuit. Any trial will be a mere formality under the standard adopted by the Louisiana Third Circuit Court of Appeals, which says:

> [W]e find that the trial court erred in holding that criminal willfulness must exist on the part of the defendant newspaper before the plaintiffs can claim a civil remedy under La.R.S. 15:1312. Hence, the newspaper can be held civilly liable for publishing the contents of the taped conversation, even if it was not charged in a criminal proceeding or *even if the elements of criminal willfulness are lacking*.
>
> Pet., App. A at 11a-12a (emphasis added).

If a trial is allowed to go forward, the newspapers will be found liable under this standard because there is no question that they published the material. Under this standard, not even the good faith belief of the newspapers that the materials were legally obtained prevents liability.

CNI and Avoyelles face the dilemma of choosing between requesting the state courts to reconsider the First Amendment issue or filing suit in a federal district court. If CNI and Avoyelles do press the constitutional issue in state court, they may jeopardize their option of filing suit in federal district court. Moreover, the option of filing in federal district court is not without its own "case and controversy" issues. Although such problems can occur in state cases which involve other kinds of constitutional defenses, when a First Amendment defense has been suppressed, simply allowing a state court trial to proceed can "seriously erode federal policy." 420 U.S. at 483.

The Court certainly could, and should, consider whether either or both the first and fourth categories of exceptions identified in *Cox* justify jurisdiction even in the absence of what ordinarily does not constitute a "final judgment." As in *Cox*, the jurisdictional issue is as significant as the substantive constitutional issue under the First Amendment. If otherwise disposed to grant the writ, this Court can decide to carry the jurisdictional issue with the case. A ruling on the jurisdictional issue favorable to the petitioner may well also resolve the standing issue in its favor. If that does not establish a sufficient interest to constitute an "injury" for purposes of standing, or if the Court has doubts, it certainly has the option of requesting to hear argument also from Avoyelles.

Avoyelles agrees completely with the petitioner on the merits and on the importance of the First Amendment issue. Counsel have pointed out jurisdictional and justiciability issues in this case as part of our duty of candor to this Court. Counsel is well aware that the Court itself will eventually discover the Article III issues in the case. Rather than possibly waste the time of this Court, and have the writ dismissed at a later time, as occurred in *Jefferson v. City of Tarrant, supra,* we think it necessary to bring to the Court's attention the issues of Article III standing and the Court's jurisdiction. Nevertheless, both the substantive First Amendment issue on the constitutionality of the lower court's interpretation of Louisiana's wiretap statute, as well as the jurisdictional issue, merit review by this Court.

CONCLUSION

We therefore urge the Court to grant the petitioner's writ of certiorari and carry the jurisdiction and standing issues with the case.

Respectfully submitted,

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September 24, 1999

APPENDIX A – ORDER OF THE LOUISIANA SUPREME COURT RE: TRIAL COURT RULING IN FAVOR OF AYMOND

McKinley KELLER

v.

Carol AYMOND, Jr., et al.

Michael J. JOHNSON

v.

Carol AYMOND, Jr., et al.

Nos. 97-CA-2203, 97-CA-2204.

Supreme Court of Louisiana.

Nov. 19, 1997.

ORDER

Plaintiffs invoke the appellate jurisdiction of this court pursuant to La. Const. Art. V, § 5(D), on ground that the district court declared La.R.S. 13:1301 [sic] et seq. unconstitutional.

Our independent review of the record reveals that the trial court's judgment never rendered the statute unconstitutional. While the trial court's judgment indicates it "conditionally" found the statutes unconstitutional, the judgment goes on to state that this finding is dependent "on the specific facts of this case, which will be revealed at trial." The judgment further states "the merits of the case and/or evidence presented at trial will decide the issue of constitutionality of La.R.S. 15:1301, et seq." Therefore, although the trial court's judgment makes certain references to the constitutionality of La.R.S. 13:1301

[sic] et seq., it is clear these statements are dicta, since the court has not yet reached the merits of the case before it.

Accordingly, the appeals from this judgment filed in this court are dismissed, and the case is remanded to the trial court for further proceedings.

KNOLL, J., not on panel; recused.

FOR THE COURT:

/s/ Bernette J. Johnson
Justice, Supreme Court of Louisiana

APPENDIX B – ORDER OF THE LOUISIANA SUPREME COURT RE: TRIAL COURT RULING IN FAVOR OF AVOYELLES

McKinley KELLER

v.

Carol AYMOND, Jr., et al.

Michael J. JOHNSON

v.

Carol AYMOND, Jr., et al.

Nos. 98-CA-0552, 98-CA-0553.

Supreme Court of Louisiana.

April 23, 1998.

ORDER

Plaintiffs invoke the appellate jurisdiction of this court pursuant to La. Const. Art. V, § 5(D), on ground that the district court declared the Electronic Surveillance Act, La.R.S. 15:1301 et seq., unconstitutional.

Our independent review of the record reveals that the trial court's judgment never rendered the Act unconstitutional. Having concluded that we have no appellate jurisdiction, this appeal is ordered transferred to the Court of Appeal, Third Circuit.

KNOLL, J., not on panel (recused). Rule IV, Part 2, § 3.

FOR THE COURT:

/s/ Jeffrey P. Victory
Justice, Supreme Court of Louisiana

Supreme Court, U.S.
FILED
OCT 12 1999
OFFICE OF THE CLERK

(5)

No. 99-42

IN THE
Supreme Court of the United States

CENTRAL NEWSPAPERS, INC.,

Petitioner,

v.

MICHAEL J. JOHNSON and McKINLEY KELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
THIRD CIRCUIT COURT OF APPEAL OF THE STATE OF LOUISIANA

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ARGUMENT

I. THE DECISION OF THE LOUISIANA COURT OF APPEAL CONSTITUTES A "FINAL JUDGMENT," AND THIS COURT HAS JURISDICTION TO REVIEW THAT DECISION.

A. The Decision of the Louisiana Court of Appeal Is the Decision of "The Highest Court of a State in Which a Decision Could Be Had."

In his Opposition, Respondent Johnson argues that jurisdiction is lacking in this Court because CNI has not "exhausted" its remedies in the state courts. (Johnson Opposition, at 4). To the contrary, CNI has pursued every available state appellate remedy that the law requires.

After the decision of the Louisiana Court of Appeal, CNI timely sought review by the Louisiana Supreme Court. That court declined to review the Court of Appeal's decision by a 4-3 vote. Pursuant to 28 U.S.C. § 1257, this Court has jurisdiction to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." Where, as here, a state supreme court declines discretionary review of an intermediate appellate court's decision, the intermediate appellate court is the highest state court in which a decision could be had. Sup. Ct. R. 13.1; *Douglas v. California*, 372 U.S. 353, 354 (1963).

Johnson's reliance on *O'Sullivan v. Boerckel*, 119 S. Ct. 1728 (1999), and *Castille v. Peoples*, 489 U.S. 346 (1989), is misplaced. Both cases address the exhaustion of state court remedies in the context of federal habeas corpus petitions under 28 U.S.C. § 2254, and neither has any bearing here.

B. The Louisiana Court of Appeal Finally Decided the Federal Issue, and its Decision Is a "Final Judgment" Within the Meaning of 28 U.S.C. § 1257 Despite the Pendency of Further State Proceedings.

Johnson's Opposition argues, and Avoyelles Publishing Company's Response suggests, that the Louisiana Court of Appeal's decision is not "final" for purposes of this Court's jurisdiction because the state court proceedings on state law issues have not yet been concluded. This Court's settled jurisprudence interpreting 28 U.S.C. § 1257 holds otherwise.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court recognized several distinct lines of cases "in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257, and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. Of particular relevance here is the fourth such category:

> [T]here are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on *nonfederal* grounds, thus rendering unnecessary review of the federal issue by this Court, and where *reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action* rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

> *In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.*

420 U.S. at 482-83 (emphasis added). *See also Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (exercising jurisdiction over petition presenting consitutionality of a pretrial discovery order).

Nine years after *Cox*, in an opinion authored by (now Chief) Justice Rehnquist, the Court relied on *Cox* in support of its decision to review an interlocutory decision of the California Court of Appeal in a press case. In *Calder v. Jones*, 465 U.S. 783 (1984), the Court wrote:

> Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Accordingly, as in several past cases presenting jurisdictional issues in this posture, "we conclude that the judgment below is final within the meaning of [28 U.S.C.] § 1257."

465 U.S. at 788, n.8. The posture of this case is no different. Though the Louisiana Court of Appeal looked beyond the scope of the narrow state law issue actually presented when it entered the decision challenged here, it nonetheless finally decided the fundamental federal question in a fashion that is binding both on CNI and Avoyelles. The Louisiana Supreme

Court declined to review the Court of Appeal's decision of the federal issue, and any Petition to this Court would have been untimely if CNI had waited for a final result on the state law questions before presenting the federal question now at issue. Sup. Ct. R. 13.1.

Here, as in *Cox*, a significant federal policy is in jeopardy. That policy — First Amendment protection of press publications that violate state law — is so fundamental that the Court has seen fit to consider variants of the basic question on four separate occasions, including in *Cox* itself. *See Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Cox*. A decade ago, the question presented by this Petition was expressly reserved in *Florida Star*, and the policy — now squarely presented by the facts in this case — warrants Supreme Court review.

C. *Jefferson v. City of Tarrant* Does Not Deprive This Court of Jurisdiction.

In its Response, Avoyelles suggests that this Court's recent decision in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), might bear on the Court's jurisdiction over this Petition. CNI respectfully disagrees. First, *Jefferson* distinguished *Cox* — it did not purport to overrule *Cox* in any respect. Second, *Jefferson* refused to *expand* the doctrines articulated as the second and third categories in *Cox*. The facts in *Jefferson* did not implicate, and the Court's decision did not consider, the fourth category of review, which supports jurisdiction here. Third, CNI does *not* seek to expand the jurisdictional doctrine articulated in *Cox* — its Petition falls squarely within that doctrine. *See, e.g.*,

Calder, 465 U.S. at 788. Finally, *Jefferson* dealt with a case in which resolution of remaining factual disputes might moot the federal issue. That is not the case here. Respondents do not even allege that CNI engaged in any wrongful conduct in acquiring the information it published, and there is no factual issue analogous to that in *Jefferson*. Here, Respondents' entire theory implicates the federal issue — they seek to impose strict liability under state law for mere publication.

D. CNI Is a Party to the Judgment.

Avoyelles suggests in its Response that CNI lacks Article III standing to petition for a writ of certiorari. As CNI noted in its Petition, the Court of Appeal rendered its decision in Respondents' appeal from the trial court's entry of summary judgment in Avoyelles' favor. [Petition, at 4-5]. The Court of Appeal's decision was based upon the trial court record made in connection with *CNI's* Peremptory Exception, in which the trial court had sustained *CNI's* assertion of a federal constitutional defense. Though CNI did not brief the Avoyelles appeal, the court's far-reaching opinion is equally binding on CNI and Avoyelles under Louisiana law. *See, e.g., Henry v. Ford Motor Company, Inc.*, 519 So. 2d 845 (La. Ct. App. 1988) ("Law of the case" doctrine applied to bar relitigation of an issue by one party when decided by a co-defendant.)

Though Louisiana does permit liberal joinder in appellate proceedings, CNI is a party to the judgment in question, and Avoyelles' citation to *United States ex rel. Louisiana v. Boarman*, 244 U.S. 397 (1917), is inapposite. There, the Court stated the general rule: "[N]o person can bring a writ of error . . . to reverse a judgment who is not a party or privy

to the record." 244 U.S. at 401 (citations omitted). Here, CNI is a party whose federal rights have been finally adjudicated by the judgment of the Court of Appeal. CNI does *not* rely on state law to establish its standing, and it easily satisfies the standing requirements of Article III. In more modern terms:

> Th[e] "irreducible constitutional minimum" of standing requires: (1) that the plaintiff have suffered an "injury in fact" — an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of — the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1997). By depriving CNI of its First Amendment defense to strict liability for republication, the Court of Appeal's decision created the circumstances necessary to confer Article III standing on CNI and Avoyelles alike.

II. RESPONDENT JOHNSON'S OPPOSITION MISSTATES THE RECORD.

In his Opposition, Johnson asserts that ". . . Central Newspapers, Inc., threw care to the wind and again printed the contents of these taped conversations knowing full well

that Aymond's activities were illegal." [Opposition, at 2]. This statement is not reflected anywhere in the record, and it is false. Importantly, the Louisiana Electronic Surveillance Act punishes publication *without* any scienter requirement, and resolution of Johnson's new factual assertion would in no way affect the federal question presented by the Petition.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
Supreme Court of the United States

CENTRAL NEWSPAPERS, INC.,

Petitioner,

v.

MICHAEL J. JOHNSON and McKINLEY KELLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEAL OF THE STATE OF LOUISIANA

SUPPLEMENTAL BRIEF FOR PETITIONER

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In its Petition, CNI noted the pendency of *Boehner v. McDermott*, 1998 WL 436897 (D.D.C. July 28, 1998) (D.C. Cir. No. 98-7156). (Petition, at 7). *Boehner*, which involves issues related to the question presented by CNI's Petition, was decided on September 24, 1999. 1999 WL 742144 (D.C. Cir. 1999).

In *Boehner*, a divided panel of the D.C. Circuit held that the First Amendment did not protect James McDermott, a member of the U.S. House of Representatives, from liability under 18 U.S.C. § 2511(1)(c) for delivering an unlawfully-prepared tape recording of a telephone conversation to the press, allegedly with knowledge of its illegal origins. The Circuit Court refrained from deciding the question presented by CNI's Petition, and noted: "[n]or should we be concerned with whether § 2511(1)(c) would be constitutional as applied to the newspapers who published the initial stories about the illegally-intercepted conference call." 1999 WL 742144, at *3.

Though it does not purport to decide the press issues presented by CNI's Petition, the Opinion for the Court in *Boehner* illuminates the practical continuum along which cases involving the First Amendment impact of prohibitions against publication fall. At one end of that continuum, those who engage in illegal conduct to *acquire* information enjoy no First Amendment protection. At the other extreme, members of the public who discuss information of general notoriety cannot be subjected to liability merely because the information was unlawfully acquired in the first instance. For example, there can be no serious argument that members of the public who discuss information pertaining to President Clinton's recent impeachment would be civilly liable for such "disclosures," despite the allegations that some such information was initially acquired in violation of Maryland

law. *See* Md. Cts. & Jud. Pro. § 10-410 (imposing civil liability for knowing disclosures of unlawfully intercepted communications).

In its Petition, CNI seeks to distinguish protected speech from unlawful conduct along that continuum. Its Petition seeks a ruling that the First Amendment protects a newspaper's pub'ication of information relating to a matter of public concern acquired at a public press conference held by a former candidate for public office on a matter of public interest — even where the source (but not the newspaper) acted unlawfully in obtaining the information.

Boehner presented a factual situation only slightly removed from the "conduct" end of the continuum, to which the First Amendment may not apply. Though he did not prepare the tape, Rep. McDermott received it from those who criminally eavesdropped and delivered it to the press, allegedly with knowledge of its illegality and without material comment. The Opinion of the Court concluded that a mere transmission of a tape to the press is not "speech" entitled to First Amendment protection. 1999 WL 742144, at *3. But that Opinion also recognized that "[w]hen a newspaper publishes, it engages in speech." *Id.* at 12.

Boehner also recognized the importance of the scienter requirement that *federal* law imposes as a precondition to liability for disclosure:

> Here, the federal prohibition on disclosure is not dependent on the content of the communication. *And of greatest importance*, § 2511(1)(c) prohibits disclosure of the communication only if the original interception was itself illegal and *only if the person charged with unlawfully disclosing its*

> *contents knew of the illegality*. See 18 U.S.C. § 2511(1)(c). In contrast, the Florida statute [which the Supreme Court held unconstitutional as applied in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989)] had *no* scienter requirement.

1999 WL 742144, at *7 (emphasis added). Unlike the federal statute upheld in *Boehner*, the Louisiana statute challenged in CNI's Petition contains no scienter requirement — as applied, it burdens pure speech without regard to the press' complicity in the illegal acquisition of information.

This Court need not discredit the decision in *Boehner*, nor need it cast doubt on the constitutionality of the federal law at issue in that case, to hold that the imposition of strict liability on the press for disclosure of information already made public offends the First Amendment. Where a newspaper receives information: (1) of public concern, (2) at a public press conference, (3) from a candidate for public office, and (4) does not participate in the acquisition of the information, its publication must be protected. A contrary holding would enable public figures to chill publication on matters of public concern — regardless of its truth — merely by alleging that it was unlawfully obtained by a source at some juncture.

The fundamental value underlying modern First Amendment protection of the press is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). To that end, public figures and public officials are unable to impose civil liability even for *false* statements of fact without proof of actual malice. *Id.*; *Gertz v. Welch*, 418 U.S. 323 (1974). To grant public officials and public figures the means to

silence the press by threatening *strict* liability based *truthful* publications would undermine 35 years of this Court's First Amendment doctrine in cases involving core speech.

The *Boehner* case illustrates the importance of the issues raised in CNI's Petition, and provides an apt avenue for addressing one narrow but central aspect of *Florida Star* that cries out for resolution by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

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